Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

ROBERT W. KEARNS,

Petitioner,

v.

GENERAL MOTORS CORPORATION
AND BROWN'S BUICK AND ISUZU,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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13 pp

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QUESTIONS PRESENTED FOR REVIEW

When does the inventor's consideration —— the "for limited times" of Const. Art. I §8 cl 8 —— start?

When, intermediate into the "for limited times", infringement occurs and is later adjudged——what happens to the inventor's consideration?

Is the Court of Appeals for the Federal Circuit's opinion supporting denial of five of Kearns' patents to him in an up-coming infringement trial with General Motors Constitutional, **and**, in accord with Part III, § 1, Article 41 ¶¶ 3 & 4 of the Uruguay Round Trade Agreements?

Are the Part III, § 532, (a)(1) [§ 154] patent provisions of the GATT Treaty Constitutional and in accord with 35 USC § 102(b) and the application-to-patent-issue-delay time?

Is the Commissioner of Patent's grant "for the term of seventeen years from the date of this grant" Constitutional?

Are 35 U.S. Code § 281 civil actions with § 284 Damages phases but without § 283 Injunction phases lawful and Constitutional?

Do the *Kearns* v. *Ford* and *Kearns* v. *Chrysler & AMC* 35 U.S. Code § 281 civil actions require § 283 phase proceedings to be lawful and Constitutional?

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There is no Mystery About Patents, by William R. Ballard, J.M. Barrett Corp., *Publishers*, 220 East 42nd Street, New York 17, N.Y. 1946. *See*, Exhibit 37. 19

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The Wall Street Journal:
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PETITION FOR WRIT OF CERTIORARI

Dr. Robert W. Kearns, inventor of the U.S. patents entitled, Windshield Wiper System with Intermittent Operation ('836), *et al.* ("IWWS") petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

On August 28, 1996, the Circuit Judges of the Court of Appeals for the Federal Circuit entered Judgment Accompanied By Opinion with costs to Appellant Dr. Kearns [Petition Appendix A] on the Detroit District Court's ORDER OF DISMISSAL of one sentence: [Petition Appendix B]

> "For reasons stated on the record on July 21, 1993 because of plaintiff's failure to designate the claims-in-suit this case is DISMISSED."

The Court CLOSED the case that same July 21 but submitted a MEMORANDUM of its own a week later. [Exhibit 34]

Kearns sought reconsideration of that CAFC Opinion asking, "How can he lose, what he hasn't had?" as Kearns' US patents have been infringed constantly, beginning before and on and after, the days each was issued.

The C.A. Fed. Cir. ordered:

> "that the petition for rehearing be, and the same is denied, and it is further ordered that the suggestion for rehearing *in banc* be, and the same is declined with the mandate having been already issued."

DATED: December 10, 1996. [Petition Appendix C]

JURISDICTION

Dr. Kearns sought reconsideration of the Opinion of the CAFC which was denied on September 26, 1996. Jurisdiction of Michigan and Virginia Courts was based on 28 U.S. Code § 1338.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 8, Clause 8

STATUTES INVOLVED

28 U.S.C. § 144. Bias or Prejudice of Judge.
28 U.S.C. § 455. Disqualification of justice, judge or magistrate
28 U.S.C. § 1338. Patents, plant variety protection, copyrights, mask works, trade-marks, and unfair competition
28 U.S.C. § 1352. Bonds executed under Federal Law
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35 U.S.C. § 284. Damages

TREATY INVOLVED

General Agreement on Tariffs and Trade ("GATT") to the Uruguay Round Agreements

STATEMENT OF THE CASE I.

On February 24, 1992, in *Kearns* v. *Chrysler Corp. and AMC*, Judge Cohn refused as he did in *Kearns* v. *Ford*, a hearing at which Mr. Aitken could present the evidence and law of Kearns' right to equitable relief——time——under 35 U.S. Code § 283. [Exhibit 1]:

> "There is nothing in statute or common law giving plaintiff the right to an injunction against practicing the disclosures of an expired patent."

(Kearns suggests the reader, complete reading this Petition before answering the question: "Was Judge Cohn's omission of the Constitution deliberate?")

I. Why is the Constitution important to this case?

(a) The standard of compensation to inventors is found at

Const. Art. I § 8 cl 8:

"To promote the progress of science and the useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

Starting with the words of the § 8 preamble, that standard of compensation is:

"Congress is given the power" "to promote" ...
"by securing" "for limited times" (plural) "to ... inventors"
"the exclusive right" "to their ... discoveries."

(b) By Congress legislating the quantity of those "for limited times", Congress legislates not only that Congress chooses "to promote"[1] but also, Congress makes that standard of compensation to the inventor *complete* as will be proven *infra*.

II. Are the "for limited times" to be "secured" to the inventor at times different from when 'the "exclusive right" to the discovery' are to be secured?

'The "exclusive right" to the discovery' for no "secured" "for limited times" is what (s)he had when (s)he discovered the new knowledge. No promotion of science and the useful arts occurs under those conditions.

Are the "for limited times" to be "secured" to the inventor at times partially overlapping that time when 'the "exclusive right to the discovery' are secured? One being secured without the other being secured at the same time is of no value. The overlapping time is the only portion of "for limited times" that has value. The Supreme Court recognized that fact when in *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U.S. 225, 228 it said:

"The grant of a patent is the grant of a statutory monopoly. ... During that period of time no one may make, use, or

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[1] "Pursuant to this constitutional authority, Congress in 1790 enacted the first federal patent and copyright law, 1 Stat. 109, ..." *See, Sperry* v. *Florida*, 373 U.S. 379 (1963).

sell the patented product without the patentee's authority."
With that understanding, we can begin our proof:
'A statutory monopoly' is granted concurrently with
'the "for limited times" of Clause 8'. (1)
Since sentence (1) is true, then reversing the sentence:
'The "for limited times" of Clause 8' is granted concurrently
with 'a statutory monopoly.' is also true. (2)
'A statutory monopoly' of (1) is 'the "exclusive
right" of Clause 8.' (3)
Substituting the phrase, 'the "exclusive right" of Clause 8'
for what is equal to it from (3): the phrase, 'a statutory
monopoly' into sentence (2), we obtain the sentence:
'The "for limited times" of Clause 8' is granted concurrently
with 'the "exclusive right" of Clause 8.' (4)
'The "for limited times" of Clause 8' includes a
'first moment of "for limited times" of Clause 8.' (5)
'The "exclusive right" of Clause 8' includes a 'first moment
of "exclusive right" of Clause 8.' (6)
Since 'the "for limited times" of Clause 8' and
'the "exclusive right" of Clause 8' occur concurrently in
sentence (4), it is also true that
'the first moment of "for limited times" of Clause 8' is
granted concurrently with
'the first moment of "exclusive right" of Clause 8.' (7)
We pause here to ask, "Can an infringement exist at 'the
first moment of "exclusive right" of Clause 8?'" (8)
The answer to sentence (8) depends upon the
legal actions of the inventor or patentee to whom
the patent is granted. *See*, p. 23. (9)
If as in sentence (4), 'the "exclusive right" of Clause 8'
occurs concurrently with 'the "for limited times" of
Clause 8', then from sentences (4), (5) and (6), 'the
first moment of "for limited times" of Clause 8' occurs with

'the first moment of "exclusive right" of Clause 8.' (10)

Dr. Kearns' Question Presented For Review is:

"When does the Clause 8 "for limited times" start?"

The start of "for limited times" = 'the first moment of "for limited times." of Clause 8.' (11)

Substituting into (10), 'the start of "for limited times" of Clause 8', for 'the first moment of "for limited times" of Clause 8' we obtain:

'The start of "for limited times" of Clause 8' occurs with 'the first moment of "exclusive right" of Clause 8.' (12)

Quod erat demonstratum.

Sentence (12) is Dr. Kearns' answer to Dr. Kearns' Question Presented For Review.

Having done that much analysis, we note as in (5),

'the "for limited times" of Clause 8' includes an 'intermediate moment of "for limited times" of Clause 8.' (13)

and, as in (6),

'the "exclusive right" of Clause 8' includes an 'intermediate moment of "Exclusive right" of Clause 8.' (14)

Substituting (13) and (14) into (4) we obtain,

'the intermediate moment of "for limited times" of Clause 8' occurs with 'the intermediate moment of "exclusive right" of Clause 8.' (15)

Similarly, from (4) no '"for limited times" of Clause 8' is granted concurrently with no '"exclusive right" of Clause 8.' (16)

No '"exclusive right" of Clause 8' = infringement (17)

Substituting "infringement" from sentence (17) for no '"exclusive right" of Clause 8' into (16) we obtain,

No' "for limited times" of Clause 8' is granted concurrently with infringement. (18)

Quod erat demonstratum.[2]

That is the "for limited times"-life-clock stops when infringement occurs intermediate into the inventor's "for limited times" until the inventor's "exclusive right" is re-established through the 35 U.S. Code § 281 'remedy' civil action. When infringement is adjudged, the 'remedy' is that the civil action occurred under a stopped life-clock.

Over-all, this means that the "for limited times" can resume and stop; resume and stop; and resume and stop, giving meaning to the plural "for limited times" in Art. I §8 cl 8.

While these Dr. Kearns-Proofs are different results than the present practice of the Judiciary, it has been proved that, the Constitutional standard of compensation to inventors is *complete* in Art. I § 8 cl 8 and means Congress' use of the phrase "term of 17 years" is unConstitutional and Congress can only set the quantity of time at, say, 17 years with the total span of the quantity of time depending upon the "success" of the invention, using the word "success" to mean the invention is infringed more times by more infringers. Successful inventions are to be promoted by clause 8, too, aren't they? If so, then why doesn't a single Fed. R. Civ. P. address the parallel work load problem of the "successful" *pro se* inventor?

Thus, Dr.-Kearns-Proofs mean litigation-delay will no longer be a defense to infringement.

In private correspondence with Commissioner Mossinghoff, he wrote to Dr. Kearns: "It is not unusual for patents to expire during infringement trials."

Dr.-Kearns'-Proof Results Apply in These Situations

What are the situations, that are lawful under the patent law,

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[2] A more simplified words proof is given to assist the reader at Petition Appendix 16.

but when they occur, may cause the inventor to lose control of his discovery before the publication of the inventor's patent?

There are two such situations. A first situation that may occur is during the one year public use bar of 35 U.S. Code § 102(b):

"A person shall be entitled to a patent unless—

(b) The invention was ... in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States, ..."

"Inventor may monopolize invention for statutory period, if he applies for patent before bar of public use intervenes." *Pyzel* v. *Black*, 1928, 24 F.2d 281, 58 App. C.C. 16.

A second situation, is that after he has made application to the Patent Office for a patent to his new discovery, he may lawfully tell others of his discovery during the time of review within the Patent Office. 35 U.S. Code § 122.

Thus, in the general case, the beginning of the "for limited times" must take into account these opportunities for an infringement to occur. From the Supreme Court statement, p. 3, l. 24, *supra*, the grant of a monopoly must be delayed if the conditions of a monopoly are shown not to have existed on the publication date of the invention by the Patent Office to the public. And, should infringement occur after the "for limited times' clock begins running —— the "for limited times" clock stops until the 35 U.S. Code § 281 'remedy' civil action re-establishes the "exclusive right."

The STATEMENT OF THE CASE II. and APPENDIX detail Kearns' experiences: in seeking an engineering specification to complete his IWWS development work; and, in attempting to meet the automotives' requirements in seeking to be an outside supplier of his U.S.-patented, IWWS discoveries to the automobile assembly industry of Detroit.

The 'summary-quote,' found at 35 U.S.C.A., for *Woodbridge* v. *U.S.*, 1923, 263 U.S. 50, 55 is:

"It was the legislative intention that the term was to run from the date of issue of the patent, ..."

but there is no analysis in *Woodbridge* that would change the Constitutional standard of compensation to inventors from the Dr.-Kearns-proofs. Ratified words of Const. Art. I § 8 cl 8 remain superior to legislative intent found in *Woodbridge*.

The U.S. Constitution is "the supreme law of the land." *See*, *Sperry*, *supra*.

"Of course, I also know that the Constitution itself is what was ratified — not the founders' intention.[3]"

"It cannot be presumed that any clause in the Constitution is intended to be without effect." *Marbury* v. *Madison*, 1 Cranch 137, 174 (1803).

"Article I, section 8 of the Constitution grants Congress the power to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries. Of the various enumerated powers it is the only one which states the purpose of the authority granted Congress. Justice Douglas, *Special Equipment Co.* v *Coe*, 324 U.S. 370, 381. "The Congress is given no general power to issue letters patent or to reward inventors as it will. An experience with grants of monopoly in England was fresh in the minds of the Fathers; the lesson had been underlined in recent differences with the Crown." Hamilton, *Patents and Free Enterprise* 1941, p. 1152, Temporary National Economic Committee, Monograph No. 31, 76th Cong., 3d Sess.

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[3] *Interpreting the Constitution* — The Supreme Court and the Process of Adjudication, page 56 by Harry H. Wellington, Sterling Professor of Law at Yale Law School. He was dean of the Law School from 1975 to 1985.

> The purpose "to promote the progress of science and useful arts" accordingly provides the standards for the exercise of the power and sets the limits beyond which it may not go." (Emphasis added.) Petitioner Kearns adds,

And sets the standards it is to achieve.

Background of this Petition

Kearns v. *General Motors*, (Detroit), was dismissed during an **unscheduled** telephone status conference on July 21, 1993. The next day, Dr. Kearns received a copy of Eric Feiler's memorandum [Exhibit 2] relating the recent events of Congressman Knollenberg. **Dr**. Kearns is not the **Mr**. Kearns discussed therein. Dr. Kearns had no knowledge of the purpose or events discussed. The legal opinion was one sentence: "For reasons... , *supra*." [Exhibit 3] The facts proving that Kearns complied with the desires of the Court prior to the telephone call-dismissal are given in the STATEMENT II.

The next day, Dr. Kearns filed *Kearns* v. *General Motors & Brown's Buick & Isuzu*, in Virginia.

At a hearing August 27, 1993, the Va. District Court ruled:

> p. 36, l. 14 THE COURT: The Court concludes that the motion to dismiss should be granted, that the doctrine of *res judicata* does apply and that the issues raised in this, although difficult somewhat prolix pleading that you seek to raise are issues that should have been raised in that (Detroit) proceeding. p. 40,l.13: THE COURT: The court adheres to its decision,dismisses the complaint as part of *res judicata*."

The Opinion of the Court of Appeals (of 7 pp) upholds Fed. R. Civ. P. 41(b) on the five patents originally Complained of in Michigan and permits trial on the remaining patents filed. The C.A. Fed. Cir. dismissal of an intellectual property case without an **actual** hearing on the merits is a violation of Part III, §1, Art. 41, ¶¶ 3&4 of the Uruguay Round GATT Treaty.

Kearns sought reconsideration of that CAFC Opinion asking,

"How can he lose, what he hasn't had?" as Kearns' US patents have been infringed constantly, beginning before and on and after, the days each was issued. The Const. Art. I §8 cl 8 does not explicitly state when the "for limited times" are to start. 35 U.S. Code § 154 of Congress' 1965/80 legislation: does not explicitly state when a patent's "for limited times" begins either, but as has been proven, is erroneous in the use of 'term of 17 years' *supra*. Via GATT § 102, upon the Supreme Court answering this Petition, the 'corrected-term/quantity' words of the U.S. 35 U.S.C. §154 or the words of Const. Art. I § 8 cl 8 need to be, and automatically will be, the substituted words in §154 of the GATT Treaty. That change in GATT's §154 words will help the U.S. foreign trade balance improve!

Kearns' analyses on pp. 3-5 prove his Const. standard of compensation 'time' has not started yet based on the *Kearns* v. *Ford Motor Co.*, and, *Kearns* v. *Chrysler & AMC* court trial records to be presented *infra*.

STATEMENT OF THE CASE II.

In 1957 Robert W. Kearns, Ph.D., formed Kearns *Engineers* as a family business. To provide security for his own job, and the jobs of Kearns *Engineers* employees he recognized, that he needed to manufacture, and sell patented products, to obtain the exclusive rights proffered by Const. Art. I § 8 cl 8.

He was motivated further after reading Congress' promises in *The Patent System and the Modern Economy*[4]:

> "(T)he patent system provides a protected market with the opportunity for unusual profit necessary to justify the heavy investment in time, effort, and capital necessary to bring the improvement to the public. This same protected market

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[4] Study No. 2 of the Subcomm. on Patents, Trademarks and Copyrights of the Senate Comm. on the Judiciary, 84th Cong., 2d sess. (1957), page 5. Congressional Library Microfilm #11997.

provides an entering wedge by which a business enterprise entering a new field can overcome the obstacles that otherwise discourage entry into an industry already populated."

Thus, Dr. Kearns invented patents: Number-mo day yr:

2,959,347-11 8 60; 3,351,836-11 7 67; 3,422,331- 1 14 67

3,483,459-12 9 69; 3,500,159-12 9 69; 3,529,227- 9 15 70;

3,564,374- 2 16 71; 3,573,584- 4 6 71; 3,581,178- 5 25 71;

3,582,747- 6 1 71; 3,593,090- 7 13 71; 3,602,790- 8 31 71;

3,604,910- 9 14 71; 3,721,115- 3 20 73; 3,728,603- 4 17 73;

3,737,750- 6 5 73; 3,774,091-11 20 73; 3,796,936- 3 12 74;

3,876,919- 4 8 75; 3,902,106- 8 26 75; 4,339,698- 7 13 82;

4,494,059- 1 15 85; 4,494,107- 1 15 85; 4,531,066- 7 23 85;

4,544,870-10 1 85; 3,458,889[5]-8 5 69; 3,643,145[2]-2 15 72.

All Dr. Kearns' U.S. inventions (above listed) were invented under the Patent Act of 1965\80, *supra*.

Recovering from the "use", *Roche*, *infra*, of his '347 by Wright-Patterson Air Base personnel and defense contractors, Dr. Kearns focused on reducing wet-weather automobile accidents. On Sept. 28, '63 [Exhibit 4] Dr. Kearns installed and tested in his family car an IWWS that he found had a temperature problem in that as the ambient temperature rose beyond a value the wipers would activate. He enclosed the control in a red box bearing the words: Kearns *Engineers*; Do Not Open; Confidential to seek an automobile engineering specification.

On October 22, '63 [Exhibit 5] Dr. Kearns in seeking said specification from Ford Motor Co. engineering personnel, Mr. Ciupak and Mr. Feaheny demonstrated some of the external features of his IWWS. Mr. Ciupak made an appointment for

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[5] acquired by Dr. Kearns.

Dr. Kearns with Ford Executive Engineer, Joe Neill on October 25, 1963. On said date, Dr. Kearns demonstrated some of the external features of his IWWS to: Mr. Neill; Project Engineer Bob Burby; Engineer Ted Daykin; and Manager of Windshield Development Mike Bozoian [Exhibit 6]. Dr. Kearns learned the temperature under the hood was 270°F and the windshield wiper motor was subjected to a life test of 3 million cycles. Mr. Neill requested a price for the technology that Dr. Kearns was to base on Mercury sales expectations? Disappointed with the meager specification, Dr. Kearns went to Chrysler engineering personnel on October 29, 1963 and saw windshield wiper engineers Mr. Willsie and Mr. Wagner. [Exhibit 7] He demonstrated the external features of his IWWS to them but did not learn any specifications. On December 12,'63, Dr. Kearns responded to Mr. Neill. On June 29, '64 Dr. Kearns learned experimentally how to prevent the temperature activation to beyond 270°F and began his life test. [Exhibit 8]

To enhance Kearns *Engineers* manufacturing facilities, he made an agreement with David Tann of Tann Corp.[6]

Dr. Kearns invents a line of Computer Central® products for Kearns *Engineers* manufacture, sale and export. Kearns *Engineers*' Computer Central® products were sold through sales representatives throughout USA, France & Japan. [Exhibit 9]

On November 16, 1964 the IWWS completed 3,400,000 intermittent cycles driving a paddle under a load of sawdust in oil. On November 30,'64 Dr. Kearns met with Mr. Nutter and Mr. Sherman of The Prestolite Company who agreed to supply windshield wiper motors to Kearns' IWWS. [Exhibit 10]

On December 1, '64, Dr. Kearns filed his '836 U.S. patent. A Roger Shipman of Ford's Advanced Electrical Design Group

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[6] Due to Tann Corp. defaults under the Kearns Tann agreement, Dr. Kearns terminated said agreement on October 4, 1969.

("AEDG") telephoned Dr. Kearns informing him: IWWS was a Federally regulated safety item; to be an outside-supplier he would have to tell him the details of his IWWS. Kearns met with Mr. Shipman and the Ford AEDG personnel, including: Ed Milligan, AEDG Mgr.; Mr. Skrbina; Mr. Ryff, Mr. Jenks, two or three times a month for the next 18 months **as Ford management had decided to include IWWS on the '69 Ford**, (in dealers' showrooms in August '68). One day, Mr. Jenks met Dr. Kearns on his way to a AEDG meeting and said, "I have designed an all-Ford IWWS, we don't need you anymore, don't come back." Later Mr. Shipman telephoned Dr. Kearns and informed him that the Jenk's IWWS had failed Ford tests and asked Dr. Kearns to again come back. Like a love affair, Dr. Kearns did go back to Ford's AEDG meetings to qualify Kearns *Engineers* for IWWS outside-supplier-to-Ford status.

On 9 December 1964: Chrysler had Mr. Tann sign a Chrysler suggestion agreement [Exhibit 11]; a Chrysler memo states that "Department 3840 has received a system schematic and is reviewing it." (Emphasis past-tense added.) [Exhibit 12] On January 16, 1965, Chrysler's Engineer S. R. Ward completed a Chrysler drawing with a Kearns-Tann IWWS in a Chrysler IWWS engineering drawing. [Exhibit 13]

Near January 27, 1965, Dr. Kearns returned to Chrysler's Mr. Wagner and Mr. Willsie and discussed the speed-torque specifications of Chrysler's windshield wiper motor.

On February 5, 1965, Chrysler's Mr. Romanski reports "[I]t has been approved by all concerned to provide the intermittent wipe on all of our C-Series models." [Exhibit 14] (Emphasis past-tense added.) On September 19, 1966, Kearns demonstrated his IWWS to Ford's: Advanced Concepts Car Engineers Skrbina and Armstrong in the morning and to Ford's Engineers Milligan, Simmons, and Newell in the afternoon. [Exhibit 15] On September 22, 1966 Chrysler's Chief Engr.

& Manager of Dodge Product Planning writes to Mr. Tann:

"We have been evaluating your windshield wiper device since early summer. We hope, if the weather cooperates, to complete a preliminary evaluation of its feature potential in the next two months."

Thus, Chrysler was testing that one car's Tann-Kearns IWWS from May '66 to December '66, **at least**.

On February 17, '67 Dr. Kearns disclosed "refinements in his IWWS design" to Ford Engineers Roger Shipman and Tony Ryff. [Exhibit 16] Before April 1, '67 Dr. Kearns disclosed to Jenks "refinements in his IWWS design." [Exhibit 17]

Upon advancing the moisture responsive capabilities of his IWWS to "continuously moisture-dwell-time variable," on a drizzling day, Dr. Kearns brought a Mercury so equipped to Ford's leader in windshield wiper design, Ted Daykin. "That's impossible!", said Daykin, when told what this IWWS would do in asking Daykin to view the latest Kearns *Engineers* IWWS external features. Kearns' '836 IWWS patent contains moisture-responsive claims, but, does not require a moisture detector. The moisture detected is that on the windshield in the area of maximum driver vision —— the wiped area.

Ford's Vice-President of Engineering, Tom Feaheny, schedules a demonstration for about 40 Ford executives.

Kearns uses a common Windex bottle to saturate the windshield with water. On the first wipe the dwell skips; then after second wipe the IWWS dwells, say 2 seconds; third wipe, say 4-5 seconds. As the wiped area dries, the changing rainbow-like patterns remaining in the water-film change. As they change, the dwell lengthens. Kearns hasn't touched the car! *See*, Ford internal memo. [Exhibit 18] Still no Ford or Chrysler purchase order to Kearns *Engineers*.

Remember, "[C]ontains about $2.00 in parts," says Chrysler memo of minutes of meeting with Tann & Kearns on 9 Decem-

ber, 64. [Exhibit 12] The moisture-IWWS of 1967 is not on 1997 car models 30 years later. Why? .... Again, "Why?" N.I.H.? (Not Invented Here ?) Is that Dr. Kearns' problem? Is that **your** family's problem when they suffer a needless death in a wet-weather automobile accident? Is it Congress' problem? (Const. Art. I §8 cl8: "To promote science ... ."

Before July,'67 Tann-Kearns attorney Joe Lane was in contact with Don Selvecki, a patent attorney for GM. On July 1, Kearns demonstrated the external features of his IWWS to GM personnel: Elmer Reece, John Dobb, new devices patent attorneys; Charles Foehl, Plt. Mgr.; Landis Kurz, Director of Reliability; R.K. Shewman, Chief Engr.; Fred Hobbs, Per. Dir.; Warren Wiese, Tech. Ctr; Ed Czabor, Engineer.[Exhibit 19]

Throughout, Dr. Kearns cooperated with Ford and Chrysler engineers in building and installing IWWSs, free of cost to their companies, in automobiles provided to Dr. Kearns by Ford and Chrysler for their tests, reviews, trying-out, and analyzing trying to be an IWWS outside-supplier.

Ford sold, IWWSs that were later adjudged by the Detroit U.S. District Court to be infringing, to American Motors Corp. ("AMC") for testing and installation in AMC model automobiles. Thus, AMC tested Kearns' IWWS, too in 1967.

When Ford's '69 models appeared with an IWWS, Kearns' patent attorneys wrote to Ford's lawyers requesting drawings and information. 39 letters exchanged. Delay between letters: potential plaintiff: total time: 1 year; potential defendant: total time: 8 years! "Why, the great difference in **delay**?" The incentive for judicial delay is eliminated in the Const. Art. I § 8 cl 8 complete standard as shown in Dr.-Kearns'-Proofs, *supra*.

See, list of *Kearns* v. *Defendants* civil litigation. Appendix 19

HIGHLIGHTS:

Kearns' 35 USC §281 'remedy'

patent infringement civil actions

Case 1 *Kearns* v. *Wood Motors, Inc., et al.*

Filed: 21 March '78. Filed first, before Ford and Chrysler. The routine 'term' of a patent is 17 years. On May 14, 1980 the Chief Patent Counsel for Porsche wrote to Dr. Kearns: "We will (litigate)...after Ford." **promising** delay! [Exhibit 20] *Kearns* v. *Wood Motors, et al.* has not come to trial in 18 3/4 years to date. A 35 U.S.C. §281 'remedy' mockery? of cl 8!

Daimler-Benz, Porsche and at least Renault are supplied infringing IWWS by SWF-Spezialfabrik fur Autozebehor Gustav Rau G.m.b.H., a corporation of the Federal Republic of Germany ("SWF"). (Remember **SWF** for later relevance.)

In 1982, in depositions held in Stuttgart, Germany it was testified by SWF engineers, that after the Kearns IWWS '836 patent was published a copy was received from the U.S. Dept of Commerce, date-stamped into SWF on March 28,'68 and circulated to SWF engineers. Soon Kearns' IWWS were copy-supplied to Daimler-Benz, Porsche and Renault by SWF. (Remember USA has a trade deficit!) Herr Wittner of Daimler-Benz said to Kearns in Washington, D.C., "Bob, if we have to buy 60,000 IWWS from Kearns *Engineers* to sell in the USA, we will buy all our world-wide production of 600,000." [Thus trade deficit depends on Judicial conduct.] On April 4,'78, Chief Patent Counsel for Porsche wrote to their USA litigation counsel [*See*, Confidential Exhibit 21][7] The documents were shared with *Wood Motors & SWF* counsel. [Exhibit 22]

Detroit District Judge structured sale of land he owned to Comerica Bank—to SWF for their headquarters in Detroit area, refused disqualification. *Wood Motors*, Docket Event #554.

Case 2 *Kearns* v. *Ford Motor Company*

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[7] The Washington Post lawyers have had a copy of such SWF, Daimler-Benz and Porsche documents for many years now. The President of Porsche told Dennis Kearns, "I feel like I am the benefactor of stolen property."

Filed: April 3, '78. After 12 years of denying infringement during the discovery phase of the 'remedy' civil action, in the Pretrial Order Ford admitted 20.5 million IWWS infringed Dr. Kearns' IWWS patents, but challenged their validity.

The District Court restricted the validity trial to one claim of each of six patents. The Ford jury [Exhibit 23] found six out of six of the Kearns IWWS patents to be valid.

Kearns' lawyers, Arnold, White & Durkee, sought damages available under 35 U.S. Code § 284 and, who are licensed patent officers of the Judiciary, **refused** to seek Const. Art. I § 8 cl 8 "the exclusive right" available under 35 U.S. Code § 283[8] under their contingency agreement asking Kearns, *"What are we going to do with 1/3 of a plant?"* Kearns studied the agreement, saw that it did not prevent Kearns from supplementing the trial with another Kearns lawyer and did so with Lane, Aitken & McCann at his own expense. Then, the Detroit District Court, who upon joining the Judiciary took an oath to support the U.S. Constitution **refused** a hearing at which patent attorney Aitken would submit to the Court the evidence and law of Kearns' entitlement to the Const. § 8 cl 8 'time'! Ford left the trial with over $700 million in profits from the infringement of Kearns' IWWS patents. Kearns left the trial: no supplier contract; no Const. Art. I §8 cl8 'time.' Kearns discharged Arnold, White & Durkee citing that the Constitutional standard of compensation to an inventor is 'time' not 'money.'

Case 4 *Kearns* v. *Chrysler and American Motors Corps.*

Filed March 2, 1982. Chrysler bought American Motors Corp. who purchased their IWWS from Ford and Chrysler.

Chrysler and AMC have headquarters in the Detroit area. Chrysler has its technical center in the Detroit area. Detroit

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[8] Grounds of equitable relief may arise other than by way of injunction. *Root* v. *Lake Shore, etc. R. Co.*, Ill. 1882, 105 U.S. 189.

District Judge structured sale of land he owned to Comerica Bank——to Chrysler, refusing disqualification. *Wood Motors, Inc. et al.* Docket Event #554[9].

After building IWWS into Chrysler supplied automobiles for their test and evaluation, Kearns formally was approved by the Chrysler management as a supplier. Dr. Kearns, as part of Kearns & Law *Engineers*, had been approved previously as a supplier to Chrysler Missile, submitting parts from Kearns and Law *Engineers* to Chrysler. Kearns and Law *Engineers* had designed and built a product as subcontractors for Bendix Corp. which had been tested at Chrysler Missile. [Exhibit 24]

Kearns *Engineers* built 20 IWWS prototypes under Chrysler's performance stand[illegible] PS 6338 and submitted them pre-tested and working for Chrysler tests. *See, Roche, infra.* The purchasing department requirements included metal mounting items to the IWWS. Kearns *Engineers* quoted $8.25 each. [Exhibit 25] Chrysler management had predicted that if Chrysler would build the IWWS in-house they would make $13+ million profits annually. [Exhibit 26] They did.

On October 15, 1991 *Chrysler & AMC* filed a Motion to exclude any testimony by Joseph Lane and Richard Aitken's testimony (for 'time' under 35 U.S.C. § 283.) On February 25, 1992, the District Court granted *Chrysler & AMC*'s motion for summary judgment eliminating Dr. Kearns' claim for 35 U.S. Code § 283 injunctive 'time' relief reducing the trial to

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[9] "[I]t is not the private use but ... the public interest which is dominant in the patent system." *Mercoid Corp.* v. *Mid-Continent Co.*, 320 U.S. 661, 665 citing: *Pennock* v. *Dialogue*, 2 Pet. 1; *Kendall* v. *Winsor*, 21 How. 322, 329; *Adams* v. *Burke*, 17 Wall. 453; *Motion-Picture Co.* v. *Universal Film Co.* 243 U.S. pp. 510-511; *Morton Salt Co.* v. *G.S. Suppiger Co.*, 314 U.S. 488, 493; *United States* v. *Masonite Corp.*, 316 U.S. 265, 278 ... The patent is a privilege. But it is a privilege which is conditioned by a public purpose ..."

a 'how-much-money-to-Dr.-Kearns' trial for a compulsory[10] license to *Chrysler & AMC* under Dr. Kearns' IWWS U.S. patents! *See*, *There is no Mystery About Patents*, by William R. Ballard, J.M. Barrett Corp., *Publishers*, 220 East 42nd Street, New York 17, N.Y. 1946. *See*, Exhibit 37.

Chrysler stipulated to be bound by the Ford validity trial. Upon the six Kearns patents being adjudged valid in Ford, and the District Court having questioned the number of patents the jury could handle, Dr. Kearns applied only the: '836 claim 15; '374 claim 3; '178 claim 6 and the '790 claim 14.

The jury found Chrysler infringed four out of the four patents tried at trial. The trial did not include AMC's infringements.

Again, the Detroit District Court, who upon joining the Judiciary took an oath to support the U.S. Constitution (that includes the inventor's compensation at § 8 cl 8) **refused** a hearing to Kearns at which Mr. Aitken, Esq. would submit to the Court the evidence and law of Kearns' entitlement to the Const. § 8 cl 8 'time'!

Chrysler left the trial with about $560 million in profits.

The Detroit District Court ruled Kearns had submitted a few too many papers to the Court regarding: 35 U.S. Code § 283 equitable relief for 'time;' and, the USA's patent position at the General Agreement on Tariffs and Trade Treaty ("GATT") in Uruguay to deter patent infringement, particularly PART III, Articles 41, 44 and 46; and, that the USA's trade deficit since March, '84 totalled $1,440 billion and at 6 % interest, the interest now accrued at a $86.5 billion annual rate.

Since Chrysler lawyers, it was said, had to read these three papers, the Court applied costs against Dr. Kearns' jury award

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[10] Congress rejected compulsory licensing in 35 U.S. Code. *See*, McFarlane Compulsory Licensing Bill; Hearing on H.R. 9259 before the O'Malley Committee, 75th Cong., 3rd Sess. (1938)

and for the benefit of Chrysler in the amount of $667,000!!

Kearns left the trial with no supplier contract nor Const. Art. I § 8 cl 8 'time' **again**, but proving their *Roche* infringements.

Upon the Court refusing Mr. Aitken a hearing on Dr. Kearns being entitled to Const. 'for limited times the exclusive right to his discoveries' by granting the *Chrysler and AMC* summary judgment, Dr. Kearns *pro se* was forced by the Detroit District Court to seek at trial only 35 U.S. Code **§ 284 Damages** again thereby violating his oath to support the Constitution, and as stated *supra*, reducing the trial to a 'how-much-money-to-Dr.-Kearns' trial for what is a compulsory license to *Chrysler & AMC* under Dr. Kearns' IWWS U.S. patents!

Case 4d *Kearns* v. *Chrysler Insurance, et al.*

Dr. Kearns waited about 8 days to be paid. Ford had paid Arnold, White & Durkee in one day.

After study in the U. of Md. Law Library — on **28 March '95**, Dr. Kearns filed in the U.S. District Court for the District of Maryland against Chrysler's insurers, a 28 U.S. Code § 1352 for collection on a supersedeas bond provided under Federal law of patent infringement under 35 U.S. Code § 281.

Not until **after** Kearns' Complaint was filed the Detroit District Court deviated from the mandate issued by the C.A. Fed. Cir. in issuing an Order Directing Payment of Money into Court[11,12,13]. On April 11,'95, Dr. Kearns filed in

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[11] An inferior court has no power or authority to deviate from the mandate issued by an appellate court. *Briggs* v. *Pennsylvania R. R.*, 334 U.S. 304, 306.

[12] A judgment is final for purposes of appeal when it terminates all issues presented in the litigation on the merits and leaves nothing to be done except to enforce by execution what has been determined. *Heike* v. *United States*, 217 U.S. 423, 429.

response, Kearns Objections & Opposition to Chrysler's Cross-Complaint and Third Party Complaint for Interpleader, Declaratory and Injunctive Relief. [Exhibit 27] The next day, the Detroit District Court filed an Order for Distribution of Funds that, *inter alia*, paid about $7.5 million to Arnold, White & Durkee for only their preliminary work, paid $3 million to Reed Smith Shaw & McClay that included a bonus that was not mandatory in their agreement, and millions to assorted others, leaving $10.4 million for Dr. Kearns to pick up.

Dr. Kearns has not 'picked up' the $10.4 million.

Cases 5, *Kearns* v. *Fred Lavery Porsche, et al.*
6, *Kearns* v. *Ferrari, et al.*
7, *Kearns* v. *General Motors Corp.*
& 9 *Kearns* v. *United Technologies, et al.*

From the transcript of the proceedings of July 23, 1992, the District Court before 13 defense lawyers at p. 16, line 3:

> THE COURT: Thus far, it seems to me that the only one who has really been thinking about the disposition of these cases is the Judge.
>
> And I have a new problem. All these cases are more than five years old, and the Sixth Circuit has adopted a rule that you can't go out of the circuit as a visiting Judge if you have any case on your docket more than five years old. So these cases are likely to pin me to the Eastern District of Michigan. If I want to go to the Northern District of Illi-

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[13] *See*, GATT *Article 46*: In order to create an effective deterrent to infringement, the judicial authorities shall have the authority to order that goods that they have found to be infringing be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to avoid any harm to the right holder, or, unless this would be contrary to existing constitutional requirements, destroyed. (Emphasis added.) The judicial authorities shall also have the authority to order that materials and implements the predominant use of which has been in the creation of the infringing goods be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to minimize the risks of further infringements.

nois, or the Middle District of Florida as a visiting judge, **I may not be able to do so because of these cases. You know, that's as incentive to get rid of them.(Emp-added)**

I'm not going to ask you to dismiss them, Dr. Kearns, and then refile them so the five years starts running all over again. I mean I could do that, but we don't want to do that.

In doing that, Kearns would lose his patents & civil actions and citizens their job interest in the patent system. Shortly, all Kearns' patent cases were dismissed from the District Court! The press has followed

the wiper-man's saga.

After a reporter followed Dr. Kearns, for two years, *The New Yorker* magazine, on January 11, 1993, [Exhibit 31] published a 14-page article entitled on a half-page 'clear' cover - Annals of Invention: Windshield Wiper Wars by John Seabrook. Many of the USA populace follow the news events of the 'wiper-man' and think of him when it rains.

Articles also appeared in:

AARP's *Modern Maturity* April-May 1993 & August-Sept 1993; The American *LEGION* July, 1992; *LIFE* 200th Anniversary Fall 1991; *Star* October 27, 1992; *Time* February 12, 1990; *Worth* February 19. All are located in Exhibit 31.

The delay-defense to infringement.

Arnold, White & Durkee's Benson, wrote a letter to All Counsel for the Defendants [Exhibit 29] in which he criticized the defense lawyers discussing:

"One advantage of not giving the values (of IW circuit components) is we can stall it (the *Ferrari* case) 6 months."

The Court later permitted the defendants' IWWS component values not to be presented to Dr. Kearns. [Exhibit 32] No engineer can calculate the circuit operation to determine infringing operation without the component values!

In *Kearns* v. *GM*, on July 6, at 4:55 p.m., Dr. Kearns **timely** faxed to Master Barker the following chart of infringements by

General Motors on the Court's three 'jury' limited Delco #1, Delco #2, Delco #3 and Delco #5 GM IWWS products. The Court had asked Dr. Kearns about the feasibility of a "world" validity trial. Dr. Kearns had already expressed to the Judge that if the Judge would relax his one claim per patent rule to two patents, that request would be a winner, *i.e.*, since the 'world' uses a permanent magnet d-c motor and General Motors uses a would field motor (*See*, '836 Fig. 5) Kearns would need two claims from that patent. The "valid" column on the chart printed in the Petition Appendix was toward that goal of Judge Cohn's.GM INFRINGES

\ GM:	GM10002;	GM10008;	GM10015;	GM10041
\	[Delco #1]	Delco #2]	Delco #3]	Delco#5]
Kearns	[ ]	]	]	]
	[ ]	]	]	]
'836	[1^12,14,16*]	1,12,14,15,16*]	16]	]
	[Hall]	18 Kearns]	]	]
'374	[1,2,3,4,6#,7]	7 - 17, 11@]	]	]
	[11]	variable level]	11]	]
'747	[ ]	]		]1,8,6,910]
'178	[6* 7]	1,3, 4, 6*, 7]	7	]1-10 p.94]
	[ ]	2, 5,]		]
	[1,2,3,4,56*7]	1,2,3,4,5,6*,7]	1,3, 7	]5 July'93]
	[ ]	]	]4$,6%*,	]5 July'93]
'790	[ ]	]	14]	9-14]
	[ ]	]	]	]
'936	[1]	1?]	1]	]1GM00043]
	[ ]	]	]	]
'090	[ ]	]	]	]
	[ ]	]	]	]
'603	[ ]	1]	]	]
	[ ]	]	]	]
'698	[4, 6]	4,6]	4,6	](verified)]
	[ ]	]		]5 July'93]
'159	[1, 2, 3]	1, 2, 3]	]no shunt field]	]5July'93]

* valid in *Ford*; @ best & diodes in Neopolitakis burn out; # not for purpose of not braking; ^ Ford type circuit. $ with DASH SWITCH in MIST position; % with 1.2M resistor at low ohm end with low enough end resistance

CONFIDENTIAL TO MASTER BARKER STAFF

From transcript of *Kearns* v. *GM* Dismissal on July 21, 1993:

SPECIAL MASTER BARKER: This is Master Barker. We have kicked this around a couple of times. Dr. Kearns and I tried to come up with — —

THE COURT: No. **I want yes or no answers. Emp**-added. *See*, Exhibit 33.

Dr. Kearns, do you have anything further to say?

DR. KEARNS: Yes, your Honor. ... . (includes:

"In addition to that, I presented to the Master a plan whereby validity of the patents would be in a single trial which is what your Honor has requested, and I showed that by the addition of only two claims that we would be able to have a common validity trial which was your Honor's desire... . *See*, VALID column in another, later, more complete GM infringement chart in the Petition Appendix.)

It's my experience that the further their (GM's) engineers went in time the closer they came to my art. I believe the list that I gave to Master Barker is proper. He is an officer of the Court. I met his deadlines, and in that I have done the professionally correct thing, which is to send it to both of my experts who are working on it at the present time."

July 22, 1993: Dr. Kearns received, Exhibit 2, a copy of a letter written on Congress' official paper; Judge Cohn closed the case on July 21, 1993, Exhibit 3; Dr. Kearns filed Case No. 12a against General Motors Corp.; The Wall Street Journal carried an article with the headline: "*Kearns's Patent Suit Against GM on Wipers is Dismissed by Judge*"; while The Detroit News headline was, "Judge Throws out wiper inventor's suit against GM". On July 23, '93 The Houston Chronicle, "*An Intermittent defeat. Judge deals blow to wiper case.*"

On August 19, '93, Dr. Kearns filed a Notice of Appeal. [Exhibit 33]. ... .(?) what happened? *See*, Case No. list, *supra*, for Kearns' *pro se concurrent and parallel* work-loads.

Case 12a *Kearns* v. *General Motors Corp.* (Virginia)

On July 22, '93, Kearns filed a Complaint against GM & Brown's Buick in the Virginia District Court.

During a hearing on August 27, '94, the Virginia District Court dismissed *Kearns* v. *GM & Brown's Buick*. On September 13,'94, Dr. Kearns filed Motion for Reconsideration:

> "The palpable defect that misled the Court is that Defendant GM's Mr. Call informed the GM device that Kearns bought in this Court's area of jurisdiction and upon which he partially based his Complaint is the Delco #3 of the Detroit District Court litigation. That is not true. As will be shown herein, the truly new device was not litigated in Detroit and leads to a different disposition of the judgment."

The C.A. Fed. Cir. panel's Circuit Judge Newman wrote a written Opinion on this appeal enforcing Fed. R. Civ. P. 41(b) wherein since District Judge Cohn had not "otherwise specified" even though the Detroit claims: '836; '178; '603' '936 and '090 were actually not "heard on the merits" the Fed. R. Civ. P. Rule 41(b) treats the 5 Detroit patents 'as if' they had been heard "on the merits." In short, the Fed. R. Civ. P. Rule 41(b) told: the Court; USA public; and all inventors; a lie!

ARGUMENT

Kearns never litigated the 5 Detroit patents against Brown's Buick & Isuzu. Ever!

This is an intellectual property case. The dismissal of a patent case under Fed. R. Civ. P. 41(b) which is "not truly on the merits" does not "promote" invention and is in stark oppo-

sition to the U.S. GATT Treaty position, as early as 1992[14]. Can Kearns lose what he hasn't yet had of his Constitutional compensation?

Judge Newman enforced Fed. R. Civ. P. Rule 41(b) with *res judicata* a 'practice' of the Court. The Statement of the Case details that Kearns has earned but not yet received the exclusive rights due his discoveries' being published to the public, as, on their respective publication dates, all Kearns' U.S. patents were being infringed and his Motion for Preliminary Injunction was denied, as well, before and after 10 January 1980 [*Wood Motors, Inc.* Docket Event #88] when the Detroit District Judge acknowledged Kearns' purpose for inventing while adjudging:

> "It is true that if plaintiff's patent were to expire prior to a decision finding the patent valid and infringed, the plaintiff's anticipated position as a major supplier of the windshield wiper systems would be undermined. The short answer to this contention is that this action will be completed before the expiration date of plaintiff's patent. The court would therefore be able to enjoin the infringement of this patent if plaintiff is successful on the merits and plaintiff would be allowed to marketing foothold which he fears would otherwise be lost.
>
> Pursuant to the foregoing, the Court will deny plaintiff's Motion for a Preliminary Injunction."

District Judge Pratt failed to keep that "short answer."

Dr. Kearns' good faith efforts to contribute inventions to the reduction in the loss of life in automobile accidents during wet-

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[14] Trade-Based Approaches to the Protection of Intellectual Property by Edward Slavko Yambrusic p. 225. Copyright 1992 by Oceana Publications, Inc. *See*, "GATT" Article 41 ¶¶ 3 & 4, p. ix.

weather were turned against the promise he accepted of Clause 8's "exclusive right" "for limited times" so that Kearns *Engineers* could expand its manufacturing and exporting business. The Appendix presents facts that outline how the *Kearns* v. *Ford Motor Company* and *Kearns* v. *Chrysler Corp. and American Motors Corp.* civil action records affirm that before the publication date, on the publication date and after the publication date of each of Dr. Kearns' IWWS patents——continuing through this day, Dr. Kearns has not had one moment of Const. Art. I § 8 cl 8's "for limited times" of "exclusive right" earned by Kearns' IWWS patented inventions whose sales have attained 700 million IWWSs.

Dr. Kearns asks this Supreme Court

Dr. Kearns asks this Supreme Court to confirm that honoring an earned Constitutional right promulgated by the U.S. government dominates a practice of the Court.

Thus, Dr. Kearns asks the Supreme Court based on the proofs contained herein, to advise the District Court for the Eastern District of Virginia that all Dr. Kearns' U.S. patents are available to him in the up-coming 35 U.S. Code § 281 'remedy' civil action for GM's alleged patent infringement.

Dr. Kearns has earned, sought a 'remedy' civil action and has been denied his Constitutional standard of compensation.

In the Detroit District Court, in two trials: *Kearns* v. *Ford*; and, *Kearns* v. *Chrysler and AMC*, the District Court limited the 'remedy' civil action to Title 35 U.S. Code **§ 284 Damages** while 'time' is the Constitutional standard of compensation proffered to the inventor in Const. Art. I § 8 cl 8.

The public's and the inventor's consideration.

The public's consideration under the U.S. patent system—new knowledge——begins with the publication of each patent and continues forever.

Dr. Kearns' standard of compensation—like that of all inven-

tors— ends with the exhaustion of the "for limited times" reckoned from the facts and records of his 35 U.S. Code § 281 'remedy' civil actions. The beginning of Dr. Kearns' IWWS U.S. patents, as is true for all inventors, is dependent upon the actions of each inventor under 35 U.S. Code **§ 102. Conditions for patentability; novelty and loss of right to patent** and the reactions of those infringers who learn of the inventors discoveries before publication of the inventor's patent.

Dr. Kearns, like other inventors, was permitted to market his discoveries within a time less than one year before his application date for his patent. *See*, Title 35 U.S. Code § 102,(b).

The Detroit District Court Kearns civil action record includes that in seeking a design specification from Ford and Chrysler engineering personnel to complete his IWWS development work, Kearns demonstrated the external features of his discoveries to them within the public use time bar. The reaction of Ford and Chrysler engineering personnel to these and other demonstrations, etc. are presented in the Appendix.

To summarize, the result is, via the Constitution and 35 USC § 102, Kearns' IWWS "for limited times" have not yet started.

Kearns' first IWWS patent application was made on 1 December 1964 and issued on 7 November 1967—— a time period of nearly three years, during which time Kearns installed his IWWS discoveries into cars: for Ford personnel and Chrysler personnel experiments; and, tests.

Thus, via 35 U.S. code § 102 *supra*, the inventor's discovery work and investment may be being infringed before the publication date of the U.S. patent issued on the inventor's discovery. The record shows Dr. Kearns' actions at Ford, made to gain supplier status, and the conduct of Ford personnel making their own "use" experiments in producing their infringing 1969 Ford, (in dealer's showrooms in August, 1968) were changed into *Roche*, *supra* infringements by Ford

and Chrysler personnel 'using' Kearns' discoveries in designing their Ford products. In the 35 U.S. Code § 281 'remedy' civil action for patent infringement, Ford admitted all 20.5 million IWWS infringements but denied Kearns' IWWS patents were valid. The *Ford* jury found six out of the six patents, approved as being within the capabilities of the jury, were found "not shown to be invalid."

In Dr. Kearns' "remedy' civil actions under 35 U.S. Code § 281 with *Chrysler Corp. and American Motors Corp.*, Chrysler and AMC lawyers stipulated to be bound by the Ford validity trial. The *Chrysler and AMC* jury adjudged that Chrysler and AMC IWWS products infringed four out of four of the six Kearns IWWS patents found "not shown to be invalid."

As with Ford, the Chrysler and AMC infringements included "made and used[15]" while developing and manufacturing their IWWS products for assembly into their automobile products.

Moreover, with the denial of Dr. Kearns' motion for preliminary injunction, the remaining alleged infringers of the world in 35 U.S. Code § 281 civil actions with Kearns were permitted by the Detroit District Court to continue their making, use and sale of Kearns' IWWS patents and discoveries as well.

Applicability to "(lost) profits."

That the patent infringement defendants controlled Dr. Kearns' market for his IWWS discoveries is another omission in the "lost profits standards" of U.S. patent law as recognized in Congressman Kastenmeier's letter. [Exhibit 34]

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[15] "But if the products of the experiment are sold, or used for the convenience of the experimentor, or if the experiments are conducted with a view to the adaptation of the invention to the experimentor's business, the acts of making or of use are violations of the rights of the inventor and infringements of his patent." W. Robinson, *The Law of Patents for Useful Inventions* § 898 (1890) as cited with approval in *Roche Products* v. *Bolar Pharmaceutical Co.*, 733 F.2d 858, 862 (Fed. Cir. 1984).

By all alleged automobile assemblers denying Kearns *Engineers* supplier status, they relegated Kearns to no sales, which in turn relegated Kearns, to a position of seeking only a "reasonable royalty" as damages and thereby reduced the automobile assemblers infringement penalty financial exposure with the Court denying Kearns § 283 'time[16].' Thus, Dr. Kearns' 'remedy' civil action was reduced to compulsory license imposed by the Court when Congress overtly refused to legislate a compulsory licensing section into the U.S. patent system. [Exhibit 35] "Congress has frequently been asked to change the policy of the statutes as interpreted by this Court by imposing a forfeiture or providing for compulsory licensing if the patent is not used within a specified time, but has not done so." *Hartford-Empire Co* v *US*, 323 U.S. 386, 433, n. 26&27.

Applicability to U.S.A. Trade

The U.S.A. is a member of the ("GATT") Treaty[17].

Since Dr. Kearns' patents in this case were invented under the prior U.S.A. patent law legislation of 1965\80, *supra*, this Supreme Court's Judgments, based upon the U.S. Constitution, to the Questions Presented For Review will apply to patents, issued under the GATT Treaty as well, with beneficial results to U.S.A. trade and standard of living of the USA populace.

Robert W. Kearns, *Pro Se*

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[16] "A patent infringement action is an equity case." *E.W. Bliss Co.* v. *Cold Metal Process Co.*, D.C. Ohio 1959, 174 F.Supp. *aff'd* in part, *reversed* in part on other grounds 285 F.2d 231, aff'd 285 F.2d 244, cert. denied 366 U.S. 911.

"In a patent infringement action, equitable principles are applied." *General Elec. Co.* v. *Skiaky Bros., Inc.*,C.A. Mich. 1962, 304 F.2d 724.

[17] *Uruguay Round Trade Agreements, Texts of Agreements, Implementing Bill, Statement of Administrative Action, and Required Supporting Statements*, 103d Congress, 2d Sess. House Document 103-316 Vol. 1

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

NOTICE OF ENTRY OF JUDGMENT ACCOMPANIED BY OPINION

OPINION FILED AND JUDGMENT ENTERED: 08/28/96

The attached opinion announcing the judgment of the court in your case was filed and judgment was entered on the date indicated above. The mandate will be issued in due course.

Information is also provided about petitions for rehearing and suggestions for rehearing in banc. The questions and answers are those frequently asked and answered by the Clerk's Office.

Costs are taxed against the Appellee(s) in favor of the Appellant(s) under Rule 39. The party entitled costs is provided a bill of costs form and an instruction sheet with this notice.

The parties are encouraged to stipulate to the costs. A bill of costs will be presumed correct in the absence of a timely filed objection.

Costs are payable to the party awarded costs. If costs are awarded to the government, they should be paid to the Treasurer of the United States. Where costs are awarded against the government, payment should be made to a the person(s) designated under the governing statutes, the court's orders, and the parties' written settlement agreements. In cases between private parties, payment should be made to counsel for the party awarded costs or, if the party is not represented by counsel, to the party pro se. Payment of costs should not be sent to the court. Costs should be paid promptly.

If the court also imposed monetary sanctions, they are payable to the opposing party unless the court's opinion provides otherwise. Sanctions should be paid in the same way as costs.

Exhibits and visual aids shall be promptly retrieved by the party that lodged them with this court.

FRANCIS X. GINDHART
Clerk

Appendix 1

cc: ROBERT W. KEARNS *Kearns* v *General Motors*, 94-1057
D. DENNIS ALLEGRETTI DCT-93-CV-966

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

94-1057

ROBERT W. KEARNS,

Plaintiff-Appellant,

v.

GENERAL MOTORS CORPORATION and BROWN'S BUICK & ISUZU,

Defendants-Appellees.

DECIDED: August 28, 1996

Before NEWMAN, Circuit Judge, NIES, Senior Circuit Judge,[18] and PLAGER, Circuit Judge.

NEWMAN, Circuit Judge.

Robert W. Kearns appeals the dismissal, by the United States District Court for the Eastern District of Virginia, of his suit for patent infringement against the General Motors Corporation and Brown's Buick & Isuzu.[19] The district court held that the action was res judicata based on the involuntary dismissal of an infringement action brought by Dr. Kearns against General Motors in the United States District Court for the Eastern District of Michigan. The Michigan action had been dismissed before trial, for Dr. Kearns' failure to comply with certain deadlines and other orders of the court. There was no adjudi-

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[18] Senior Judge Helen Wilson Nies died on August 7, 1996. The case was decided by the remaining judges in accordance with Fed. Cir. Rule 47.11.

[19] *Kearns* v. *General Motors Corp.*, C.A. No. 93-966-A (E.D. Va. Aug. 29, 1993), *reconsid'n denied*, September 28, 1993, Oct. 26, 1993.

cation of the merits by the Michigan court, the dismissal was on procedural grounds, and was preceded by the district court's refusal to permit Dr. Kearns, appearing *pro se*, tardily to amend his complaint to add other patents to the five patents that were identified in the complaint.

In the Virginia complaint Dr. Kearns included the five patents that were before the Michigan court plus sixteen additional patents. The Virginia district court held that all twenty-one patents "should have been litigated in the Detroit litigation and they're barred by not having been so." Concerning the devices asserted to be infringing, the Virginia court stated that "even if the controls in the instant case differ from the controls litigated in the Michigan case, the case is still barred by res judicata." Neither the Michigan court nor the Virginia court made any substantive determination with respect to any patent or any accused device. The Virginia court did not identify the inventions claimed in any of the patents: the five patents that were also in the Michigan complaint and the sixteen additional patents that were only in the Virginia complaint.

We agree with the Virginia district court that the Michigan decision was res judicata in Virginia as to the five patents that were before the Michigan court. That suit could not be reopened in Michigan, and thus could not be opened in Virginia. However, we conclude that the Michigan decision was not res judicata as to the sixteen patents that were presented for the first time in the Virginia complaint.

DISCUSSION

The complaint that was filed in Michigan charged General Motors with infringement of five specified patents. A letter from General Motors to Dr. Kearns dated September 2, 1992, relating to discovery, acknowledged only the five patents in suit. On July 2, 1993 the special master issued an order which stated that "Dr. Kearns letter of June 24, 1993 refers to some

7,424 claim-circuit combinations potentially at issue, involving 23 different patents. There are only five patents in this suit from which to select claims." At a hearing on July 21, 1993 the Michigan court stated that there were only five patents in suit, a statement to which General Motors and Dr. Kearns agreed.

In its Memorandum accompanying its order of involuntary dismissal, the Michigan court referred to the five patents as the only patents in suit. "Plaintiff alleges ownership of five patents as follows: [five patent numbers listed]." The Memorandum also quotes the special master's order that "There are only five patents in this suit from which to select claims." The district court's order of dismissal did not, either directly or indirectly, include the still-unidentified patents that had not been asserted against General Motors.

The basis of the dismissal in Michigan was Dr. Kearns' inadequate compliance with the court's orders and deadlines. Thus the Michigan court rejected Dr. Kearns' attempt to amend his complaint after the court's final deadline. Although Dr. Kearns apparently argued that he needed additional discovery to determine which models infringed which patents, the Michigan court concluded that dismissal under Fed. R. Civ. P. 41(b)[20] was appropriate. That decision was affirmed by this court, and is not subject to collateral attack. *Kearns* v. *General Motors Corp.*, 31 F.3d 1178 (Table), 33 USPQ2d 1696 (Fed. Cir. 1994)(nonprecedential), *cert. denied*, 115 S.Ct.

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[20] **Rule 41(b) Involuntary Dismissal:Effect Thereof.**
For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specified, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under rule 19, operates as an adjudication upon he merits.

1105 (1995).

A dismissal pursuant to Rule 41(b) is deemed to be on the merits unless the dismissing court specifies otherwise. However, the Michigan decision disposed of only the five patents that were before that court. Each of the sixteen additional patents in the Virginia complaint is, by law, directed to a separate invention. 35 U.S.C. §101. Indeed, two independent and distinct inventions can not be claimed in the same patent. See 35 U.S.C. §121:

> If two or more independent and distinct inventions are claimed in one application, the Commissioner may require the application to be restricted to one of the inventions.

By statutory and common law, each patent establishes an independent and distinct property right. *See, Consolidated Fruit-Jar Co.* v. *Wright*, 94 U.S. 92, 96 (1877) ("A patent for an invention is as much property as a patent for land. The right rests on the same foundation, and is surrounded and protected by the same sanctions."); *Carl Schenck, A.G.* v. *Nortron Corp.*, 713 F.2d 782, 786 n.3, 218 USPQ2d 698 (Fed. Cir. 1983)(a patent is a property right).

Each patent asserted raises an independent and distinct cause of action. Just as infringement of one patent is not a ground of liability for infringement of a different patent, so an involuntary dismissal of a suit regarding one patent is not a ground for dismissal of a different suit on a different patent. A possible basis for barring the different suit is that the causes of action should have been litigated together. However, precedent illustrates that, in cases in which res judicata was applied solely on the basis that a second cause of action could have been included with the first, the first case was fully litigated on its merits and the same issues were raised in the second case. *E.g.*, *Mars Inc.* v. *Nippon Conlux Kabushiki-Kaisha*, 58 F.3d

616, 35 USPQ2d 1311 (Fed. Cir. 1993) (interpretation of a patent claim in prior infringement litigation has issue preclusive effect in second case between same parties; however, disputed facts concerning different accused devices rendered summary judgment improper); Del Mar Avionics, Inc. v. Quinton Instrument Co., 836 F.2d 1320, 1324, 5 USPQ2d 1255, 1258 (Fed. Cir. 1987) ("a point not in litigation in one action cannot be received as conclusively settled in any subsequent action upon a different cause, because it might have been determined in the first action.") (quoting *Cromwell* v. *County of Sac*, 94 U.S. (4 Otto) 351, 356 (1876)). When applying res judicata to bar causes of action that were not before the court in the prior action, due process of law and the interest of justice require cautious restraint. Restraint is particularly warranted when the prior action was dismissed on procedural grounds.

Neither the Michigan nor the Virginia Court discussed the substance of any of the patents before it. However, the Virginia court summarily barred Dr. Kearns from enforcing any of these twenty-one patents. This action rendered unenforceable and useless sixteen patents that had never before been before any court. Such a destruction of property rights demands adequate procedural and substantive bases. Rule 41(b) does not reasonably impose res judicata upon causes of action that were not pled in the dismissed action. See Montana v. United States, 440 U.S. 147, 153 (1979) (res judicata requires that there have been "a full and fair opportunity to litigate" the precluded subject matter).

The Michigan court, dismissing Kearns' complaint on procedural grounds, did not, because it could not, reach out to extinguish substantive patent rights that were not before it. In Lawlor v. National Screen Serv. Corp., 349 U.S. 322, 327 (1955) the Court, discussing res judicata in connection with a

procedural dismissal with prejudice, observed that "the judgment was unaccompanied by findings and hence did not bind the parties on any issue ... which might arise in connection with another cause of action." Res judicata does not automatically apply to claims that might have been included in the prior complaint; it must be shown that they necessarily were included in the judgment, and that the interest of justice is not disserved by applying res judicata to claims that were never presented for adjudication. See, Brown v. Felsen, 442 U.S. 127, 132 (1970) ("Because res judicata may govern grounds and defenses not previously litigated, however, it blockades unexplored paths that may lead to truth. For the sake of repose, res judicata shields the fraud and the cheat as well as the honest person. It is therefore invoked only after careful inquiry.")

Issue preclusion, of narrower scope than res judicata, requires that the identical issue was decided on the merits between the parties. 1B James W. Moore et al., Moore's Federal Practice ¶¶0.401, 0.405, 0.441 (2d ed. 1992). In the case at bar it is not possible to show that the identical issue was presented in the sixteen patents that were not before the Michigan court, as in the five patents that were; for each patent, by law, covers a independent and distinct invention. Further, infringement must be separately proved as to each patent. *See generally Young Engineers, Inc.* v. *United States Int'l Trade Comm'n*, 721 F.2d 1305, 1316, 219 USPQ 1142, 1152 (Fed. Cir. 1983), where in this court stated, albeit in dictum, that "With respect to patent litigation, we are unpersuaded that an 'infringement claim,' for purposes of claim preclusion, embraces more than the specific devices before the court in the first suit." *See also, e.g., Angel* v. *Bullington*, 330 U.S. 83, 202-03 (1947) ("It is not every case in which a litigant has had 'one bite at the cherry' that the law forbids another. In other words, it is

not every such case in which the policy of stopping litigation outweights that of showing the truth.") *See generally* 18 C. Wright, A. Miller and E. Cooper, *Federal Practice and Procedure* §§4419, 4442, 4443 (1981) (discussing the appropriateness of a flexible view); *Restatement (Second) of Judgments* §27 comment e (1982) ("In the case of a judgment entered by confession, consent, or default, none of the issues is actually litigated" and issue preclusion does not apply.)

We conclude that the dismissal of the Michigan suit under Rule 41(b) did not impose the bar of *res judicata* upon patents that had not been included in the Michigan suit, were not before the Michigan court, and were not part of the Michigan Judgment. Precedent cautions that *res judicata* is not readily extended to claims that were not before the court, and precedent weighs heavily against denying litigants a day in court unless there is a clear and persuasive basis for that denial.

We conclude that the Michigan dismissal was *res judicata* only with respect to the five patents that were before the Michigan court. The dismissal is affirmed as to these five patents. The dismissal is vacated as to the sixteen patents that were not before the Michigan court. The case is remanded for appropriate further proceedings.

Costs to Dr. Kearns.

AFFIRMED IN PART, VACATED IN PART,
and REMANDED

CLOSED JUL 21 1993

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT W. KEARNS,
Plaintiff,

v. Civil No. 85-70461

GENERAL MOTORS CORPORATION,
Defendant.
_____/

ORDER OF DISMISSAL

For reasons stated on the record on July 21, 1993 because of plaintiff's failure to designate the claims-in-suit this case is DISMISSED.

SO ORDERED.

s/
AVERN COHN
UNITED STATES DISTRICT JUDGE

DATED: JUL 21 1993
Detroit, Michigan

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ORDER

A suggestion for rehearing in banc having been filed by the APPELLANT, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and the suggestion for rehearing in banc thereafter circulated to judges on the panel that heard the appeal and to the remaining active judges of the court, no judge having asked for a poll whether to rehear the appeal in banc.

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate has already issued.

FOR THE COURT,
JAN HORBALY, CLERK

S/

Dated: December 10, 1996 Brian P. LeDuc
Associate Chief Deputy
Clerk

cc: ROBERT W. KEARNS
D. DENNIS ALLEGRETTI

FILED
U.S.COURT OF APPEALS
FOR THE FED. CIR.
DEC 10 1996
CLERK

KEARNS V GENERAL MOTORS, 94-1057
(DCT - 93-CV-966)

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

CONSTITUTIONAL PROVISION INVOLVED

Article I, Section 8, Clause 8

"The Congress shall have the Power:

To promote the Progress of Science and Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

STATUTES INVOLVED

28 U.S.C. § 144. Bias or Prejudice of Judge

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that is made in good faith. (As amended May 24, 1949, c. 139, § 65, 63 Stat. 99.)

28 U.S.C. § 455. Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

(4) He knows that he, individually or as a fiduciary, or his

spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.

28 U.S.C. § 1338. Patents, plant variety protection, copyrights, mask works, trade-marks, and unfair competition

(a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trade-marks. Such jurisdiction shall be exclusive of the courts of the states in patent, plant variety protection and copyright cases.

(b) The district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, plant, plant variety protection or trade-mark laws.

(c) Subsections (a) and (b) apply to exclusive rights in mask works under chapter 9 of title 17 to the same extent as such subsections apply to copyrights.

(As amended Dec. 24, 1970, Pub. L. 91-577, Title III, § 143(b), 84 Stat. 1559; Nov. 19, 1988, Pub. L. 100-702, Title X, § 1020(a)(4), 102 Stat. 4671.)

28 U.S.C. § 1352. Bonds executed under Federal Law

The district courts shall have original jurisdiction, concurrent with State courts, of any action on a bond executed under any law of the United States, except matters within jurisdiction of the Court of International Trade under section 1582 of this title. June 25, 1948, c. 646, 62 Stat. 934; Oct. 10, 1980, Pub.L. 96-417, Title V, § 506, 94 Stat. 1743.

35 U.S.C. § 102, Conditions for patentability; novelty and loss of right to patent

A person shall be entitled to a patent unless-

(a) the invention was known or used by others in this

country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for patent, or

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country more than one year prior to the date of the application for patent in the United States, or ...

35 U.S.C. § 122, Confidential status of applications

Applications for patents shall be kept in confidence by the Patent Office and no information concerning the same given without authority of the applicant or owner unless necessary to carry out the provisions of any Act of Congress or in such special circumstances as may be determined by the Commissioner. July 19, 1952, c.950, § 1, 66 Stat. 801.

35 U.S.C. § 131, Examination of application

The Commissioner shall cause an examination to be made of the application and the alleged new invention; and if on such examination it appears that the applicant is entitled to a patent under the law, the Commissioner shall issue a patent therefor. July 19, 1952, c. 950, § 1, 66 Stat. 801.

35 U.S.C. § 154, Contents and terms of patent

Every patent shall contain a short title of the invention and a grant to the patentee, his heirs or assigns, for the term of seventeen years, subject to the payment of fees as provided for in this title, of the right to exclude others from making, using, or selling the invention throughout the United States, referring to the specification for the particulars thereof. A copy of the specification and drawings shall be annexed to the patent and be a part thereof.

As amended July 24, 1965, Pub.L. 89-83, § 5, 79 Stat. 261; Dec. 12, 1980, Pub. L. 96-517, § 4, 94 Stat. 3018.

1980 Amendment. Pub.L. 96-517 substituted "payment of fees" for "payment of issue fees."

35 U.S.C. § 281, Remedy for infringement of patent

A patentee shall have remedy by civil action for infringement of his patent. July 19, 1952, c.950, § 1, 66 Stat. 812.

35 U.S.C. § 283, Injunction

The several courts having jurisdiction of cases under this title may grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable. July 19, 1952, c. 950, § 1, 66 Stat. 812.

35 U.S.C. § 284, Damages

Upon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court.

When the damages are not found by the jury, the court shall assess them. In either event the court may increase the damages up to three times the amount found or assessed.

The court may receive expert testimony as an aid to the determination of damages or of what royalty would be reasonable under the circumstances. July 19, 1952, c. 950, § 1 Stat. 813.

Fed. R. Civ. P. Rule 41 (b) Dismissal of Actions

Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper

venue or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

United States District Court
for the Eastern
District of Michigan
Local Rule Involved

Sixth District Local Rule number 100.2 (a)

Random Method for Assignment of Cases to Judges. The Clerk shall employ, in those places of holding court in which two or more Judges serve, a random method for the assignment to Judges of civil, criminal, special civil cases and miscellaneous matters. Special civil cases are defined as those cases arising under 28 U.S.C. §§ 2241 and 2254 and 42 U.S.C. §§ 1983 and 1985 in which the plaintiff is an inmate of any facility of the Michigan Department of Corrections, the United States Bureau of Prisons, or any county or local jail. A case in which a three-Judge court is requested under 28 U.S.C. § 2284 shall be assigned by random method regardless of the place of holding court in which the case is filed. Assignment of cases to the Chief Judge, to Senior Judges, and, in cases of emergency, to Judges in active service, shall be provided by administrative order of the Court.

TREATY INVOLVED

General Agreement on Tariffs and Trade ("GATT") to the Uruguay Round Agreements was signed in April 1994, submitted to Congress in September of 1994, and enacted in January 1995.

PART III
ENFORCEMENT OF
INTELLECTUAL PROPERTY RIGHTS
SECTION 1: GENERAL OBLIGATIONS

Article 41

1. Members shall ensure that enforcement procedures as

permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements and remedies which constitute a deterrent to further infringements. Those procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.

2. Procedures concerning the enforcement of intellectual property rights shall be fair and equitable. They shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.

3. Decisions on the merits of a case shall preferably be in writing and reasoned. They shall be made available at least to the parties to the proceeding without undue delay. Decisions on the merits of a case shall be based only on evidence in respect of which parties were offered the opportunity to be heard.

4. Parties to a proceeding shall have an opportunity for review of a judicial authority of final administrative decisions and, subject to jurisdictional provisions in a Member's law concerning the importance of a case, of at least the legal aspects of initial judicial decisions on the merits of a case. However, there shall be no obligation to provide an opportunity for review of acquittals in criminal cases.

5. It is understood that this Part does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the capacity of Members to enforce their law in general. Nothing in this Part creates any obligation with respect to the distribution of resources as between the enforcement of intellectual property rights and the enforcement of law in general.

Article 44

Injunctions

1. The judicial authorities shall have the authority to order a party to desist from infringement, *inter alia* to prevent the entry into the channels of commerce in their jurisdiction of imported goods that involve the infringement of an intellectual property right, immediately after customs clearance of such goods. Members are not obliged to accord such authority in respect of protected subject matter acquired or ordered by a person prior to knowing or having reasonable grounds to know that dealing in such subject matter would entail the infringement of an intellectual property right.

2. Notwithstanding the other provisions of this Part and provided that the provisions of Part II specifically addressing use by governments, or by third parties authorized by government, without an authorization of the right holder are complied with. Members may limit the remedies available against such use to payment of remuneration in accordance with subparagraph (h) of Article 31. In other cases, the remedies under this Part shall apply or, where these remedies are inconsistent with a Member's law, declaratory judgments and adequate compensation shall be available.

Article 46

Other Remedies

In order to create an effective deterrent to infringement, the judicial authorities shall have the authority to order that goods that they have found to be infringing be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to avoid any harm to the right holder, or, unless this would be contrary to existing constitutional requirements, destroyed. The judicial authorities shall also have the authority to order that materials and implements the predominant use of which has been in the creation of the infringing

Treaty Involved (Con't.)

goods be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to minimize the risks of further infringements. In considering such requests, the need for proportionality between the seriousness of the infringement and the remedies ordered as well as the interests of third parties shall be taken into account. In regard to counterfeit trademark goods, the simple removal of the trademark unlawfully affixed shall not be sufficient, other than in exceptional cases, to permit release of the goods into the channels of commerce.

List of Kearns' 35 USC §281 patent infringement civil actions:

Case No.	Court	Action	Plaintiff v. Defendants	Date of Event YrMoDa
1.	E.D. Mich. S.D.	**78-70642**	*Kearns* v. *Wood Motors; Daimler-Benz; Porsche.*	
2.	E.D. Mich. S.D.	**78-70740**	*Kearns* v. *Ford Motor Co.*	**Trial**
3a	D.C. Maryland	**B78-882**	*SWF GmbH* v *Kearns of Germany*	**Transfer** 791116
3b	E.D. Mich. S.D.	**79-74451**	*SWF GmbH* v *Kearns*	791116
	C.A. Fed. Cir.	**87-1356**	*Kearns* v *Ford Motor Co.; Wood Motors, Inc.; Robert Bosch Corp.; Daimler-Benz; Porsche;* with *SWF GmbH* v *Kearns*	Filed same day as 'too soon' decision.

* * *

Note: Harness, Dickey & Pierce's long term client is Chrysler.
[Can't sue your customer practice, again. = Kearns' lawyers withdrew, again.]
Note: Dr. Kearns hires McDougall, Hersh & Scott Chicago, Ill.

* * *

3c	C.A. Fed. Cir.	**94-1303**	*KEARNS* v *CHRYSLER & AMC*
		94-1305,-21	*KEARNS* v *TOYOTA*
		94-1306	*KEARNS* v *FERRARI*
		94-1307	*KEARNS* v. *WOODS v. SWF*
		94-1308	*KEARNS* v *LAVERY PORSCHE*
		94-1310	*KEARNS* v *UNITED TECHNOLOGIES*
		94-1311	*BITTMAN* v *KEARNS KEARNS* v *REED SMITH SHAW & McCLAY*
		94-1313	*KEARNS* v *AMERICAN ARBITRATION & ARNOLD, WHITE & DURKEE*
		94-1522	*KEARNS* v *DAIMLER-BENZ*
3d	C.A. Fed. Cir.	**96-1314**	*Kearns* v *Daimler-Benz*

Case No.	Court	Action	Plaintiff v. Defendants	Date of Event YrMoDa
4a	E.D. Mich. S.D.	**82-70748**	*Kearns* v *Chrysler/AMC*	**Trial**
4b	D. Conn.	**92-MC16(PCD)**	*Kearns* v *Chrysler/AMC*	
4c	C.A. Fed. Cir.	**92-1531**	*Kearns* v. *Chrysler & AMC*	
4d	D. Maryland	**95-938**	*Kearns* v. *Chrysler Insurance; Safeco Ins. of Amer.; Chrysler Corp.; Lakeforest Chrysler*	
4e	E.D. Mich S.D.	**82-70748**	Order Directing Payment Money into the Court	950403
4f	E.D. Mich S.D.	**82-70748**	Cross Complaint & 3rd Party Complaint for Interpleader, Declaratory and Injunctive Relief	950404
4g	E.D. Mich S.D.	**82-70748**	Kearns' Objections & Opposition to Chrysler's Cross-Complaint and Third Party Complaint for Interpleader, Declaratory and Injunctive Relief	950411
4h	E.D. Mich S.D.	**82-70748**	Order for Distribution of Funds Deposited in Court	950412
4i	E.D. Mich S.D.	Notice	Notice of Appeal	950501
4k	C.A. Fed. Cir.	**95-1334**	Appeal (funds)	950501
4l	C.A. Fed. Cir.	**95-1016**	*KEARNS* v *CHRYSLER*	
5a	E.D. Mich. S.D.	**82-70749**	*Kearns* v *Lavery Porsche; Wood Motors; Volkswagen Werke; NSU Auto Union AG*	

Case No.	Court	Action	Plaintiff	v.	Defendants	Date of Event YrMoDa
5b	C.A. Fed. Cir.	**84-655**	*Kearns*	v	*Lavery Porsche; Wood Motors; Volkswagen Werke; NSU Auto Union AG*	
5c	Supreme	84-907	*Kearns*	v	*Lavery Porsche; Wood Motors; Volkswagen Werke; NSU Auto Union AG*	
6.	E.D. Mich. S.D.	**85-70459**	*Kearns*	v	*Ferrari, S.p.A.; AB Volvo; Alfa Romeo; Automobiles-Citroen; BMW; British Leland; Fuji Heavy Ind.; Group Lotus Cars; Honda Motor Co.; Isuzu Motor Co.; Mitsubishi Motors; Nissan Motor Co.; Maserati; Peugeot; Renault; Rolls Royce; Saab-Scania; Toyo Kogyo (Mazda); Toyota;*	YrMoDa

Case No.	Court	Action	Plaintiff v. Defendants	Date of Event
6.	E.D. Mich. S.D.	**85-70459**	*Kearns* v *Ferrari,S.p.A con't.* *Barnett Pontiac-Datsun;* *Bavarian Motor Village;* *Dalgliesh Cadillac-Peugeot;* *Joe Dwyer Subaru Volvo;* *Falvey of Troy;* *Grosse Pointe AMCJeepRenault* *La Fontaine Toyota;* *Seaway Motors;* *Sports Car Exchange* *Tamaroff Buick-DMC-Honda-Rolls Royce;* *and, Wood Motors, Inc..*	
8a	U.S. Claims	**436-84C**	*Kearns* v *United States*	Refused
8b	C.A. Fed. Cir.	**85-645**	*Kearns* v *United States* "Contract"	Denied
8c	Supreme	**84-1849**	*Kearns* v *United States*	
7.	E.D. Mich. S.D.	**85-70461**	*Kearns* v *General Motors*	
9.	E.D. Mich. S.D.	**92-71408**	*Kearns* v *United Tech.;* *United Tech. Automotive*	
10.	E.D. Mich. S.D.	**92-73649**	*Kearns* v *Amer. Arbitration;* *Arnold, White & Durkee*	
11a	D.C. for Col.	**92-0501**	*Bittman* v *Dr. Kearns* *Kearns* v. *Reed Smith Shaw & McClay*	**Transfer**
11b	E.D. Mich. S.D.	**93-74013**	*Bittman* v. *Dr. Kearns* *Kearns* v. *Reed Smith Shaw & McClay*	

Case No.	Court	Action	Plaintiff v. Defendants	Date of Event
12a	E.D. Virginia Alexandria D.	**93-966-A**	*Kearns* v *General Motors; Brown's Buick & Isuzu*	
12b	C.A. Fed. Cir.	**94-1057**	*Kearns* v *GM & Brown's Buick*	
12c	Supreme	96- ?	*Kearns* v. *GM & Brown's Buick*	
Misc.			*KEARNS* v. *FOLEY & LARDNER*	
Misc.			*KEARNS* v. *FULBRIGHT & JAWORSKI*	

* * *

APPENDIX B (*see*, Exhibit 37)

"The public's appraisal of the patent system has been elicited more than once by legislative proposals to introduce into it a compulsory licensing provision. Such a provision, while ostensibly leaving the system intact, would in fact reduce the value of the patent grant to a mere shadow, as the testimony on each occasion has made clear. The latest attempt was in March, 1938 when extended hearings were held on H.R. 9259 - the McFarlane bill.

McFarlane Compulsory Licensing Bill; Hearing on H.R. 9259 before the O'Malley Committee, 75th Cong., 3rd Sess. (1938)

Dr.-Kearns'-Proof
in simplified words

Let:

A = 'A statutory monopoly'

B = 'the "for limited times" of Clause 8'

C = 'the "exclusive right" of Clause 8'

D = 'first moment of "for limited times" of Clause 8'

E = 'first moment of "exclusive right" of Clause 8'

F = 'the start of "for limited times" of Clause 8'

G = 'intermediate moment of "for limited times" of Clause 8'

and, H = 'intermediate moment of "exclusive right" of Clause 8.

Proof sentences with the above substitutions:

A is granted concurrently with B (1)

B is granted concurrently with A (2)

A = C (3)

Substituting C for what is equal to C from (3):
the phrase A into sentence (2), we obtain the sentence:

B is granted concurrently with C (4)

B includes D (5)

C includes E (6)

Since B and C occur concurrently in sentence (4),
it is also true that

D is granted concurrently with E (7)

We pause here to ask,

"Can an infringement exist at E?" (8)

The answers to sentence (8) depends upon the
legal actions of the inventor or patentee to whom
the patent is granted. *See*, p. 23. (9)

If as in sentence (4),
C occurs concurrently with B,
then from sentences (4), (5) and (6),
D occurs concurrently with E (10)

Dr. Kearns' Question Presented For Review is
"When does the Clause 8 "for limited times" start?"

F = D (11)

Substituting into (10), F for D, we obtain:

F occurs concurrently with E (12)

Quod erat demonstratum.

Sentence (12) is Dr. Kearns' answer to
Dr. Kearns' Question Presented For Review

Having done that much analysis,
we note as in (5),

B includes G (13)

and, as in (6),

C includes H (14)

Substituting (13) and (14) into (4),
we obtain,

G is granted concurrently with H (15)

Similarly, from (4)

no B is granted concurrently with no C (16)

No C = infringement (17)

Substituting "infringement" from
sentence (17) into (16), we obtain, in words:

No ' "for limited times" of Clause 8' is
granted concurrently with infringement. (18)

Quod erat demonstratum.

A letter from Dr. Kearns to the District Court of 24 June '93:

Re: Rule 60(b) motion with regard to Uruguay Round "frivolous denied" paper; & Designation of circuits.

Dear Judge Cohn,

I have a doctor's appointment at 10 a.m. this morning in Easton, Mary land. Tomorrow at 9:30 a.m. I have an all day appointment for a whole body physical with Johns Hopkins hospital in Baltimore starting with Dr. Shawn Simpson. I have waited months for this physical opportunity. The hospital telephoned me before the status conference to remind me, and I reconfirmed that I would be there during that call.

I planned to write the referenced papers in that order. You will see why when you read them.

May I have relief beyond 'close of business' tomorrow to designate the circuits for Mr. Allegretti?

Dr. Kearns' IWW U.S. patent No.	Number of claims	Number of GM circuits	Number of claim charts to review
1.	'836	19	
2.	'331	23	
3.	'459	17	
4.	'159	6	
5.	'227	17	
6.	'374	18	
7.	'584	9	
8.	'178	9	
9.	'747	18	
10.	'090	18	
11.	'790	19	
12.	'115	39	
13.	'603	1	
14.	'750	5	

15.	'091	13
16.	'936	7
17.	'919	12
18.	'106	18
19.	'698	16
20.	'059	12
21.	'870 w/son,Tim	23
22.	'889	7
23.	'145	6

232 x 32 = 7,424

cc: Mr. Allegretti
Do you oppose Judge Cohn granting me relief?

Cordially,
Robert W. Kearns
(410) 827-9337

On July 27, '93 Dr. Kearns faxed to Master Barker the following chart of infringements by General Motors on the Court and 'jury' limited Delco #1, Delco #2, and Delco #3 IWWS products. For the benefit of the reader, from the patent chart *supra*, the 17 year 'routine' life from issue: for the '698 is until (7 13 99); and for the '059 is until (1 15 '02). V

	GM INFRINGES CLAIMS:				A L I
\ GM	GM10007	GM10008	GM10015		D
\	Delco #1]	Delco #2]	Delco #3]	Trial]	Ferrari
Kearns\			Candidate		?
'836	1	1			
	12	12			
	14	14	14	14	
		15			
	16*	16*	16* 16*	16*	16
'374	1				
	2				
	3				
	4				
	6*			6*	6
	7	7			
'374		8			
con't.		9			
		10			
	11	11	11	11	
		12			
		13			
		14			
		15			
		16			
		17			
'747	16	16	16 16	10	10
					16

	GM INFRINGES CLAIMS:						V A L I D
\ GM / Kearns\	GM10007 Delco #1]	GM10008 Delco #2]	GM10015 Delco #3] Trial Candidate			]Ferrari ?	
'178	1	1	1				
	2	2					
	3	3	3				
	4	4	4				
	5	5					
	6*	6*	6*	6*	6*	6	
	7	7	7				
'790			14*	14*	14*	14	
'936	1	1?	1	1	2#	1	

(2# contains 1)

'090 Is it true, there are no non-depressed park IWWSs for GM?

'603	1	1	1		1
'698	4	4	4	4	4
	6	6	6	6	6
'159	1	1			
	2	2			
	3	3		3	3

FILED
MAR 20 1997
OFFICE OF THE CLERK

No. 96-1312

In the
Supreme Court of the United States
OCTOBER TERM, 1996

ROBERT W. KEARNS,
Petitioner,
v.
GENERAL MOTORS CORPORATION
AND BROWN'S BUICK AND ISUZU,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

D. DENNIS ALLEGRETTI
BURNS & LEVINSON
125 Summer Street
Boston, Massachusetts 02110
(617) 345-3000

Attorney for Respondents, General Motors Corporation and Brown's Buick & Isuzu

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

STATEMENT PURSUANT TO SUPREME COURT RULE 29.1

General Motors Corporation does not have a parent company. Its wholly-owned subsidiaries that have issued shares to the public are identified below:

Publicly Traded Subsidiaries, Joint Ventures and Affiliates:

American Mobile Satellite Corporation
Detroit Diesel Corporation
Fiem Sung Sun (India) Ltd.
Isuzu Motors Limited
Nippan Avionics Co. Ltd.
Suzuki Motor Corp.

Other Subsidiaries, Joint Ventures and Affiliates:

AC Battery Corporation
AC Rochester Luxembourg S.A.
AMBRAKE Corporation
Adam Opel Aktiengesellschaft
Adela Investment Company S.A.
AeroVironment, Inc.
Alambrados y Circuitos Electricos, S.A. de C.V.
Allison Transmission Europe B.V.
Alpha Trans Leasing Verwaltungsgeselischaft mbH
Applied Ceramics
Arabian Battery Holding Company
Arabian Financing Company
Arcomex S.A. de C.V.
Argonaut Holdings, Inc.
Argonaut Relocation Services, L.L.C.
Ameses Electricos Automotrices S.A. de C.V.

Other Subsidiaries, Joint Ventures and Affiliates (Cont'd):

Asset Leasing GmbH
Aura S.r.I.
Autocable Industries (Pty) Limited
Autohaus am Nordring GmbH, Berlin
Auto Lease Payment Corporation
Automotive Battery Manufacturing, Inc.
Autos y Maquinas del Ecuador S.A. (AYMESA)
Avis Europe Ltd
Avis, Inc.
Banco General Motors S.A.
Battery Technology Services, Inc.
Beijing Wanyuan GM Automotive Electronic Control Co., Ltd. (aka Beijing WY-GM Automotive Electronic Control Co., Limited)
Brazauto Industria er Comercio Ltda.
Brazauto Trading (Cayman) Limited
Bujias Mexicanas, S.A. de C.V.
CAMI Automotive, Inc.
Calsonic Harrison Co., Ltd.
Carus Grundstucks-Vermietungsgesellschaft mbH & Co., Object Kuno 65 KG
Carus Grundstucks-Vermietungsgesellschaft mbH & Co., Object Leo 40 KG
Centro Tecnico Herramental, S.A. de C.V.
Chevrolet Sociedad Anonima de Ahorro para Fines Determinados
Cilva Holdings Plc.
Cimflex Teknowledge
Coalition Undertaking Remedial Efforts, Inc.
Compagnie de Faisceaux Tunisiens International S.A.
Componentes Delfa, C.A.
Componentes Para Automotores, S.A. de C.V.

Other Subsidiaries, Joint Ventures and Affiliates (Cont'd):

Condupac International, Inc.
Consorcio Nacional GM Ltda.
Controladora General Motors, S.A. de C.V.
Controladora Mexicana de Autopartes, S.A. de C.V.
Cordaflex, S.A. de C.V.
DHB America Inc.
DHB Componentes Automotivos S.A.
DRB s.a./n.v. (aka Delco Remy Belgique)
Daewood Automotive Components, Ltd.
Dealership Liquidations, Inc.
Delco Remy-Componentes Electronicos, LDA.
(aka Delco Remy (Portugal) Componentes Electricos, Lda.)
Delkor Corporation (aka Chusikhoesa Delkor)
Delmex de Juarez, S.A. de C.V.
Delphi Alambrados Automotrices, S.A. de C.V.
Delphi Asientos, S.A.
Delphi Automotive Systems Australia Ltd.
Delphi Automotive Systems do Brasil Ltda.
Delphi Automotive Systems China, Inc.
Delphi Automotive Systems Deutschland GmbH
Delphi Automotive Systems Espana, S.A.
Delphi Automotive Systems, Inc.
Delphi Automotive Systems Luxembourg S.A.
Delphi Automotive Systems Poland Sp. z o.o.
Delphi Automotive Systems Private Limited
Delphi Automotive Systems, S.A. de C.V.
Delphi Automotive Systems Singapore Pte Ltd
Delphi Automotive Systems Vienna GmbH
Delphi Cableados, S.A. de C.V.
Delphi Calsonic Compressors, S.A.
Delphi Cetasa, S.L.
Delphi Chassis Systems UK Limited

Other Subsidiaries, Joint Ventures and Affiliates (Cont'd):

Delphi Cisa, S.A.
Delphi Colvegasa, S.A.
Delphi Componentes Mecanicos de Matamoros, S.A. de C.V.
Delphi Componentes, S.A.
Delphi Energy and Engine Management Systems (M) Sdn Bhd
Delphi Energy and Engine Management Systems UK Overseas Corporation
Delphi Ensamble de Cables y Componentes, S.A. de C.V.
Delphi Ensamble De Cubiertas Automotrices, S.A. de C.V.
Delphi France Automotive Systems S.A.
Delphi Harrison Calsonic S.A.
Delphi Interior Systems South Africa (Pty)
Delphi Italia Automotive Systems S.r.l.
Delphi Italia Service Center S.r.l.
Delphi L'EM Argentina S.A.
Delphi Overseas Corporation
Delphi Packard Austria Ges.mbH
Delphi Packard Deutschland GmbH
Delphi Packard Electric (Guangzhou) Company, Ltd.
Delphi Packard Electric Sielin Argentina S.A.
Delphi Packard Electric Systems (M) Sdn Bhd
Delphi Packard Electric Venezuela C.A.
Delphi Packard Elektrik Sistemleri Limited Sirketi
Delphi Packard Romania s.r.l.
Delphi Packard Sistemas Electricos, S.A.
Delphi Rimir, S.A. de C.V.
Delphi Saginaw Steering Systems UK Limited
Delphi Steering (Malaysia) Sdn Bhd
Delphi Teknik Oto Yan Sanayi Limited Sirketi
Delphi Unicables, S.A.
Delphi Vestiduras Fronterizes, S.A. de C.V.
Delredo, S.A. de C.V.

Other Subsidiaries, Joint Ventures and Affiliates (Cont'd):

Detroit Diesel Corporation
Diavia Aire, S.A.
Diavia Brasil-Ar Condicionado Ltda.
DR DE CHIHUAHUA, S.A. de C.V.
EDESA Societe Anonyme Holding
EL-MO Leasing Corporation
EMD Leasing Corporation
ENCI S.A.R.L.
EPEC S.A.
Electro-Motive Maintenance Operations Pty Ltd
Empresas "Ca-Le" de Tlaxcala S.A. de C.V.
Exhaust Systems Corporation
f & g megamos Sicherheitselektronik GmbH
Fabrica Nacional De Autobuses, C.A.
Fiem Sang Sun (India) Ltd.
Fisher Body Limited
Freevale Limited
GM Allison Japan Limited
GM Auto Receivables Co.
GM-DI Leasing Corporation
GM Europe GmbH (aka GM Europe GmbH Russelsheim)
GM Factoring Sociedade de Fomento Comercial Ltda.
G.M. Holding (Portugal) SGPS, Lda.
GM Investment Trustees Limited
GM Leasing S.A.-Arrendamento Mercantil
GM Mergeco Corp.
GM Nigeria Limited
GM Ovonic L.L.C.
GM Personnel Services, Inc.
GM-Saab Communication GmbH
GM (UK) Pension Trustees Limited
GMC Truck Motors Development Corporation

Other Subsidiaries, Joint Ventures and Affiliates (Cont'd):

GMLG Ltd.
GMOC Administrative Services Corporation
GMOC Australia Pty. Ltd.
GMODC Finance N.V.
Genasys L.C.
General International Insurance Services Limited
General International Limited
General International (UK) Limited
General Motors Acceptance Corporation
General Motors de Argentina S.A.
General Motors Asia, Inc.
General Motors Asian and Pacific Operations (Pte) Ltd.
General Motors Automobiles Philippines, Inc.
General Motors do Brasil Ltda.
General Motors of Canada Limited-General Motors du Canada Limitee
General Motors Cancer Research Foundation, Inc.
General Motors Chile S.A., Industria Automotriz
General Motors China (Components), Inc.
General Motors China, Inc.
General Motors Colmotores, S.A.
General Motors Commercial Corporation
General Motors Coordination Center N.V.
General Motors del Ecuador S.A.
General Motors Egypt, S.A.E.
General Motors (Europe) AG (aka General Motors Europe)
General Motors Export Corporation
General Motors Foreign Sales Corporation
General Motors Foundation, Inc.
General Motors GmbH & Co. OHG
General Motors Hellas, A.B.E.E.
General Motors-Holden's Automotive Limited

Other Subsidiaries, Joint Ventures and Affiliates (Cont'd):

General Motors-Holden's Sales Pty. Limited
General Motors Holding Espana, S.A.
General Motors Holdings (U.K.)
General Motors Import & Distribution GmbH
General Motors Importaktiebolag (aka General Motors Import AB)
General Motors India Limited
General Motors Indonesia, Inc.
General Motors Interamerica Corporation
General Motors International Operations, Inc.
General Motors Investment Management Corporation
General Motors Investment Services Company N.V.
General Motors Japan Ltd. (trade name: Nihon General Motors Kabushiki Kaisha)
General Motors Kenya Limited
General Motors Korea, Inc.
General Motors Locomotive Group India Limited
General Motors Market Development of Canada Limited (aka Compagnie De Developpement Du Marche and General Motors Du Canada Limitee)
General Motors de Mexico, S.A. de C.V.
General Motors Nederland B.V.
General Motors New Zealand Pensions Limited
General Motors Nordiska AB
General Motors Overseas Commercial Vehicle Corporation
General Motors Overseas Corporation
General Motors Overseas Distribution Corporation
General Motors Peru S.A.
General Motors Poland Spolka, zo. o.
General Motors Receivables Corporation
General Motors Research Corporation
General Motors Taiwan Ltd.

Other Subsidiaries, Joint Ventures and Affiliates (Cont'd):

General Motors (Thailand) Ltd.
General Motors Uruguay, S.A.
General Motors U.S. Trading Corp.
General Motors Venezolana, C.A.
General Motors Women's Foundation
General Motors Yugoslavia, trade company with limited liability
(aka General Motors Yugoslavia d.o.o.)
Genie Mecanique Zairois, S.A. R. L.
Grand Pointe Holdings, Inc.
Group Lotus, plc
Holden New Zealand Limited
Holden's Agencies Pty. Limited
Holden's Motor Overseas Corporation Limited
Hubei Delphi Automotive Generator Co., Ltd.
Hughes Electronics Corporation
I. K. Coach Co., Ltd.
IBC Vehicles (Distribution) Limited
IBC Vehicles Limited
INLAN-Industria de Componentes Mecanicos, S.A.
ITT Automotive Electrical Systems, Inc.
Industries Mecaniques Maghrebines, S.A.
Industrija Delova Automobila, Kikinda
Isuzu Credit Service Co., Ltd.
Isuzu-General Motors Australia Limited
Isuzu Motors Limited
Japan Auto Service Co., Ltd.
Jennings Motors, Inc.
Jinbei GM Automotive Co. Ltd.
KDS Company, Ltd.
Katcon, S.A. de C.V.
Lidlington Engineering Company, Ltd.
Lutton Design Centre Limited

Other Subsidiaries, Joint Ventures and Affiliates (Cont'd):

MB Cable Confection Sdn. Bhd. (Malaysia)
MLS UK Ltd.
MLS USA, Inc.
Macopel, S.A. de C.V.
Mechanical Breakdown Insurance Management Limited
Metal Casting Technology, Inc.
Middle East Battery Company
Millbrook Land and Co., Ltd.
Millbrook Pension Management Ltd.
Millbrook Proving Ground, Ltd.
Motor Enterprises, Inc.
Motors Trading Corporation
New-Cen Commercial Corporation
New Cure, Inc.
New United Motor Manufacturing, Inc.
New Venture Gear, Inc.
North American New Cars, Inc.
Omnibus BB Transportes, S.A.
Opel Austria GmbH
Opel-Automobilwerk Eisenach-PKW GmbH
(aka Opel-AWE GmbH)
Opel Belgium N.V.
Opel C&S spol.s.r.o.
Opel China GmbH
Opel Eisenach GmbH
Opel Espana de Automoviles, S.A.
Opel France S.A.
Opel Guangzhou Precision Machining Co. Ltd.
Opel Hungary Automobile Production Ltd.
Opel Hungary Automotive Distribution Ltd.
Opel Hungary Automotive Manufacturing Ltd.
Opel Ireland Limited

Other Subsidiaries, Joint Ventures and Affiliates (Cont'd):

Opel Italia S.p.A.
Opel Nederland B.V.
Opel Norge
Opel Oy
Opel Portugal-Comercio e Industria de Veiculos S.A.
Opel Polska sp. zoo
Opel (Suisse) SA
Opel Turkiye Limited Sirketi (aka Opel Turkey)
Opel-Wohnbau GmbH
P.T. Mesin Isuzu Indonesia
P.T. Packard Kabelindo Murni Indonesia
PDES, Inc.
PES/SCC
PT General Motors Buana Indonesia
Packard CTA Pty. Ltd.
Packard Electric Bai Cheng Co., Limited
Packard Electric Ceska republike s.r.o.
Packard Electric Hebi
Packard Electric Ireland Limited
Packard Electric Shanghai Co., Limited
Packard Electric Vas kft
Packard Hughes Interconnect Company
Packard Hughes Interconnect Connection System
Packard Hughes Interconnect Engineering Services
Packard Hughes Interconnect Mexico
Packard Hughes Interconnect Wiring Systems
Productos Delco de Chihuahua, S.A. de C.V.
Promotora de Partes Electricas Automotrices S.A. de C.V.
Provencorp S.A.
Qual-Effic Services, Inc.
Radiadores Richard, S.A.
Reinshagen GmbH

Other Subsidiaries, Joint Ventures and Affiliates (Cont'd):

Reinshagen Tournai S.A.
Rio Bravo Electricos, S.A. de C.V.
Riverfront Development Corporation
Riverfront Holdings, Inc
Robotic Vision Systems, Inc.
Ruedas de Aluminio, C.A.
Saab Automobile AB
Saab Cars Holdings, Inc.
Saab Cars USA, Inc.
Saab Financial Services Corp.
Saab Opel Sverige AB
Saginaw Deutschland GmbH
Saginaw Norinco Lingyun Drive Shaft Co., Ltd.
Saturn Corporation
Saturn County Bond Corporation
Saturn Distribution Corporation
Shanghai Delco International Battery Company, Ltd.
Shinsung Packard Company, Ltd.
Sistemas de Asientos Para Vehiculos Automotrices
Sistemas Electricos y Conmutadores, S.A. de C.V.
Sistemas Para Automotores de Mexico, S.A. de C.V.
Sociedad de Comercializacion Internacional Colmotores, S.A.
Societe Francaise des Amortisseurs de Carbon S.A. (aka Delco de Carbon)
Subaru-Isuzu Automotive, Inc.
Sung San Company, Ltd
Suzuki Motor Corporation
Texton P.L.C.
Texton S.A.
Trinter Sociedad Anonima Comercial, Industrial y Financera
Truck and Bus Engineering U.K., Limited
U.M.I. Universal Motors Israel Ltd.

Other Subsidiaries, Joint Ventures and Affiliates (Cont'd):

United Australian Automotive Industries Limited
Unterstuetzungsgesellschaft der Kabelwerke Reinshagen GmbH (aka Unterstutzungsgesellkschaft mbH)
Uptown Land Development Corporation
Uveral S.A.
VHC Sub-Holdings (UK) Ltd
Vauxhall Motors (Finance) Plc
Vauxhall Motors Limited
Vauxhall Properties Limited
View Engineering, Inc.
Volvo GM Canada Heavy Truck Corporation
Volvo GMK Heavy Truck Corporation
WRE, Inc.
Woodbridge Foam Deutschland, GMBH
Zhejiang Delphi Asia-Pacific Brake Co. Ltd.

Partnerships:

ASEC Manufacturing
ASEC Sales
GM-ARA Industrial Cleaning
Low Emission Paint Research and Development Partnership
Low Emissions Technologies Research and Development Partnership
Supercomputer Automotive Applications Partnership
United States Automotive Materials Partnership

Consortia:

Auto/Oil Quality Improvement Research Program
Automotive Polymer-Based Companies Joint Venture and Development Partnership (aka Automotive Composites Consortium)

Consortia (Cont'd):

CAD/CAM Consortium
Electrical Wiring Component Applications Partnership
Environmental Research Consortium
High Speed Serial Data Communications Research and Development Consortium
Low Emissions Technologies Research and Development Partnership
National Automated Highway Systems Consortium
Occupant Safety Research Partnership
U.S. Council for Automotive Research
United States Advanced Battery Consortium
Vehicle Recycling Consortium

Other Subsidiaries, Joint Ventures and Affiliates of Hughes Electronics Corporation:

ACCSCO S.A.
ACHIP Technologies, Inc.
AMI Instruments, Inc.
ARINC Incorporated
Advanced Toll Management Corp.
American Mobile Satellite Corporation
Anadolu Otomotiv Sanayi VE Ticaret A.S.
Applied Intelligent Systems, Inc.
Aralmex, S.A. de C.V.
Avicom International, S.A.
CEI Co., Ltd.
California Broadcast Center, LLC
Circuitos Binancionales de Tijuana S.A. de C.V.
DTVI One, Inc.
DTVI Two, Inc.
Delco Electronics Asia/Pacific Pte Ltd.

Other Subsidiaries, Joint Ventures and Affiliates of Hughes Electronics Corporation (cont'd):

Delco Electronics Corporation
Delco Electronics Europe GmbH
Delco Electronics Overseas Corporation
Delco Electronics Singapore Pte. Ltd.
Delco Electronics (Suzhou) Co., Ltd.
Delnosa, S.A. de C.V.
Deltronicos de Matamoros, S.A. de C.V.
DIRECTV Enterprises, Inc.
DIRECTV Global, Inc.
DIRECTV, Inc.
DIRECTV International, Inc.
DIRECTV Japan Kabushiki Kaisha
DIRECTV Merchandising, Inc.
DIRECTV Operations, Inc.
Empressa Nacional de Optica SA
Ensambladores Electronicos de Mexico, S.A.
FLIR Systems, Inc.
FUBA Automotive GmbH
FUBA Automotive LLC
First Portland Technology Corp.
Groom Aviation Limited
Puiado y Control SA
H E Microwave Corporation
HBH Company
HE Holdings, Inc. (dba Hughes Electronics)
HNS-Clairtel GP, Inc.
HNS Common Carrier Services, Inc.
HNS India, Inc.
HNS-India VSAT, Inc.
HNS-Italia S.r.L.
HNS de Mexico, S.A. de C.V.

Other Subsidiaries, Joint Ventures and Affiliates of Hughes Electronics Corporation (cont'd):

HNS-Shanghai, Inc.
HNS Shared Hub Services, Inc.
Hughes Aircraft of Canada Limited
Hughes Aircraft Company
Hughes Aircraft Holdings Canada Ltd.
Hughes Aircraft Mississippi, Inc.
Hughes Aircraft-South Carolina
Hughes Aircraft Systems International
Hughes Airport Development Corporation Sdn Bhd
Hughes Arabia Limited
Hughes Asia Pacific Hong Kong Limited
Hughes Australia International PTY Ltd.
Hughes-Avicom International, Inc.
Hughes do Brasil Eletronica e Comunicacoes S.A.
Hughes Communications Carrier Services, Inc.
Hughes Communications Galaxy, Inc.
Hughes Communications GLA, Inc.
Hughes Communications, Inc.
Hughes Communications Japan, Inc.
Hughes Communications Satellite Services, Inc.
Hughes Communications Services, Inc.
Hughes Danbury Optical Systems, Inc.
Hughes Data Systems
Hughes Electronics Reality, Inc.
Hughes Electronic Systems (Malaysia) Sdn Bhd
Hughes Electronic Technologies, Inc.
Hughes Electronics Holding GmbH
Hughes Electronics International, Inc.
Hughes Electronics Manufacturing Service Company
Hughes Environmental Systems, Inc.
Hughes Escorts Communications Limited

Other Subsidiaries, Joint Ventures and Affiliates of Hughes Electronics Corporation (cont'd):

Hughes Espana S.A.
Hughes ESSM Co.
Hughes Europe N.V.
Hughes Flight Training Limited
Hughes Foreign Sales Corporation
Hughes Georgia, Inc.
Hughes Information Systems Company
Hughes International Corporation
Hughes International GmbH
Hughes International de Mexico, S.A. de C.V.
Hughes International Sales Corporation
Hughes International Sales Corporation No. 2
Hughes Investment Management Company
Hughes Ispat Limited
Hughes-Kenwood RDSS, Inc.
Hughes Lexington, Inc.
Hughes Microelectronics Europa Espana, S.A.
Hughes Microelectronics Europe Limited
Hughes Microelectronics Limited
Hughes Middle East Limited
Hughes Missile Systems Company
Hughes Nadge Corporation
Hughes Network Systems France
Hughes Network Systems, Inc.
Hughes Network Systems International Service Company
Hughes Network Systems Limited
Hughes Olivetti Telecom, Ltd.
Hughes Olivetti Telecom, N.V.
Hughes Power Products, Inc.
Hughes Research Analytics, Inc.
Hughes Research Laboratories, Inc.

Other Subsidiaries, Joint Ventures and Affiliates of Hughes Electronics Corporation (cont'd):

Hughes Simulation International, Inc.
Hughes Software Systems Private Limited
Hughes Space and Communications Company
Hughes Space and Communications International, Inc.
Hughes STX Corporation
Hughes Systems Management International
Hughes Technical Services Company
Hughes Telecommunications & Space Company
Hughes Training, Inc.
Hughes Training Systems, Inc.
Hughes Transportation Control Systems, Inc.
Hughes (U.K.) Limited
ICO Global Communications (Holdings) Limited
i-Logix Inc.
International Electro-Optical Industry Anonim Sirketi
International Electronics Systems, Inc.
Japan Satellite Communications Network Corporation
L-T Ranches, Inc.
MDP, Ltd.
MESC Holdings, Inc.
MESC Overseas, Ltd.
Magnavox Systems, Limited
Mecel AB
Microelectronics and Computer Technology Corporation
NETSAT Express, Inc.
Nippon Avionics Co., Ltd.
PT. Pasifik Satelit Nusantara
Satelitron S.A. de C.V.
Serampang Hughes Sdn. Bhd.
Shanghai Delco Electronics and Instrumentation Co., Ltd.
Shanghai Hughes Network Systems

Other Subsidiaries, Joint Ventures and Affiliates of Hughes Electronics Corporation (cont'd):

Spectrolab, Inc.
Standard Missile Company, L.L.C.
Systems Building Corp.
The Gulf Industrial Technology Company (KSC)
Translant, Inc.
UKADGE Systems Limited
XMC Holdings, Ltd.

Partnerships:

AMRAAM International Licensing Company
ERAPSCO
G. & F. Company
Galaxy Latin America
H & D Radio Frequency Identification Products
H & R Company
HKV
HMK
Harris-Magnavox Systems Corporation
Hughes-Pareto Research Partnership
IRISS Company
Lifestar Digital Television, Inc.
RALS (aka RAM Alternate Launcher System)
SJ & LA Associates
Verinet

Other Subsidiaries, Joint Ventures and Affiliates of General Motors Acceptance Corporation:

ABA Motriz Financiamiento S.A. de C.V.
Banque Opel

Other Subsidiaries, Joint Ventures and Affiliates of General Motors Acceptance Corporation (cont'd):

CIM Insurance Corporation
Cadmic Agency Corporation
Cadmic Agency Corporation of Ohio
Canadian Securitized Auto Receivables Corporation
Capital Auto Receivables, Inc.
Car Care Plan GmbH
Car Care Plan (Holdings) Limited
Car Care Plan Limited
Car Care Plan (Securities Division) Limited
Commercial Care Plan Limited
Empresa Mixta GEMACVEN, S.A.
Executive Closing Services, Inc.
Executive Trustee Services, Inc.
GM Credit AB
GM Finance HB
GM Motor Club, Inc.
GMAC de Argentina S.A.
GMAC Arrendadora S.A. de C.V.
GMAC, Australia (Finance) Limited
GMAC Automotriz Limitada
G.M.A.C. Colombia S.A.
GMAC Comercial Automotriz Chile S.A. (aka GMAC Chile)
G.M.A.C.-Comercio e Aluguer de Veiculos, Lda.
GMAC Commercial Corporation
GMAC Commercial Equity Investments, Inc.
GMAC Commercial Mortgage Corporation
GMAC Commercial Mortgage Securities, Inc.
GMAC Commercial Realty, Inc.
GMAC del Ecuador S.A.
GMAC Espana, S.A. de Financiacion
GMAC Espana, S.A. Sociedad de Arrendamiento Financiero

Other Subsidiaries, Joint Ventures and Affiliates of General Motors Acceptance Corporation (cont'd):

G.M.A.C. Financierse Colombia S.A. Compania de Financiamiento Comercial
GMAC Finansiering A/S
GMAC Holding S.A. de C.V.
GMAC International Finance, B.V.
GMAC Italia Leasing S.p.A.
GMAC Leaseco Limited/GMAC Location Limitee
GMAC Leasing Corporation
GMAC Leasing (U.K.) Limited
GMAC Leasing (U.K.) (No. 1) Limited
GMAC Leasing (U.K.) (No. 2) Limited
GMAC Leasing (U.K.) (No. 3) Limited
GMAC Mortgage Corporation
GMAC Mortgage Corporation of TN
GMAC Mortgage Group, Inc.
GMAC Mortgage Holdings, Inc.
GMAC Mortgage Securities, Inc.
GMAC Mortgage Securities II, Inc.
GMAC RF, Inc.
GMAC Rahoitus Oy
GMAC Sverige AB
General Acceptance (Thailand) Ltd.
General Motors Acceptance Corporation, Australia
General Motors Acceptance Corporation of Canada, Limited
General Motors Acceptance Corporation, Colombia, S.A.
General Motors Acceptance Corporation, Continental
General Motors Acceptance Corporation del Ecuador S.A. GMAC-Management (Holding)
General Motors Acceptance Corporation Hungary Financial Services Limited Liability Company
General Motors Acceptance Corporation International

Other Subsidiaries, Joint Ventures and Affiliates of General Motors Acceptance Corporation (cont'd):

General Motors Acceptance Corporation Italia S.p.A.
(aka GMAC Italia)
General Motors Acceptance Corporation Nederland N.V.
(aka GMAC Nederland)
General Motors Acceptance Corporation, North America
General Motors Acceptance Corporation (N.Z.) Limited
General Motors Acceptance Corporation del Peru, S.A.
General Motors Acceptance Corporation de Portugal-Servicos Financeiros, S.A.
General Motors Acceptance Corporation, S.A. de C.V.
General Motors Acceptance Corporation, South America
General Motors Acceptance Corporation Suisse S.A.
General Motors Acceptance Corporation (U.K.) Finance plc
(aka GMAC UK plc)
General Motors Acceptance Corporation (U.K.) Public Limited Company
General Motors Acceptance Corporation de Venezuela, C.A.
General Motors Austria Beteligungsgesellschaft m.b.H
(aka GMAC Austria)
Holden National Leasing Limited
HomeComing Financial Network, Inc.
Inversiones 252-29, C.A.
Ladue Associates, Inc.
Lease Auto Receivables, Inc.
Locomotive Leasing Partners, L.L.C.
MIC General Insurance Corporation
MIC Life Insurance Corporation
MIC Life Reinsurance Company, Limited
MIC Property and Casualty Insurance Corporation
MIC Re Corp.
MIC Services Corporation

Other Subsidiaries, Joint Ventures and Affiliates of General Motors Acceptance Corporation (cont'd):

Mortgage Assets Trading, Inc.
Motors Insurance Company Limited
Motors Insurance Corporation
Motors Insurance Purchasing Group, Inc.
Motors Mechanical Reinsurance Company, Limited
NAVCO Corp.
National General Assurance Company
National General Insurance Company
National General Marketing, Inc.
Opel Bank GmbH
Opel Bankgesellschaft m.b.H.
Opel Bank Hungary Reszvenytarsasag
Opel-Handler Versicherungsdienst GmbH
Opel Leasing GmbH & Co. OHG (aka Opel Leasing)
Opel Leasing Verwaltungs GmbH
Opel Leasinggesellschaft m.b.H.
Opel Masterlease GmbH
P. T. GMAC Lippo Finance
Patlan Corporation
Polbank, S.A.
R. L. Autoguard (1992) Limited
RFC Asset Holdings, Inc.
Republic Realty Mortgage Corporation
Residential Accredit Loans, Inc.
Residential Asset Securities Corporation
Residential Consumer Services of Alabama, Inc.
Residential Consumer Services, Inc.
Residential Consumer Services of Ohio, Inc.
Residential Consumer Services of Texas, Inc.
Residential Funding Corporation
Residential Funding Mortgage Exchange Corporation

Other Subsidiaries, Joint Ventures and Affiliates of General Motors Acceptance Corporation (cont'd):

Residential Funding Mortgage Securities I, Inc.
Residential Funding Mortgage Securities II, Inc.
Residential Funding Securities Corporation
Residential Money Centers, Inc.
Risk Monitors, Inc.
Servicios GMAC S.A. de C.V.
Trinity General Agency, Inc.
Vehicle Guarantees Limited
Wholesale Auto Receivables Corporation

Partnerships:

Corral, L.P.
GSL Partners

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No. 96-1312

In the

Supreme Court of the United States

OCTOBER TERM, 1996

ROBERT W. KEARNS,

Petitioner,

v.

GENERAL MOTORS CORPORATION AND BROWN'S BUICK AND ISUZU,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents General Motors Corporation ("GM") and Brown's Buick and Isuzu (hereinafter collectively referred to as "Respondents") hereby oppose the Petition for Writ of Certiorari filed by Robert W. Kearns ("Kearns") in this case.

STATEMENT OF THE CASE

Kearns' brief in support of his Petition constitutes yet another effort by a stubbornly disobedient litigant to blame the entire "Judicial Branch" of government for the consequences of his dilatory and improper conduct as a pro se plaintiff in patent

infringement litigation against GM. Following the dismissal of his action for willful and repeated refusals to obey the discovery orders of the district court in Michigan, Kearns retaliated by filing this second and duplicative action in the federal district court in Virginia, and now seeks to avoid the consequences in the instant case of his conduct in the prior action. He seeks to evade the application by the Virginia district court of the doctrine of *res judicata* against his dismissed prior claims in Michigan, by making the bizarre and unsupportable claim that the Court should extend the life of the patents underlying these lost claims.

Kearns' "Constitutional" arguments here ignore the proper application by the Federal Circuit of the principle of *res judicata*. Kearns' assertion that the Constitution requires this Court to grant him an exception to the laws passed by Congress limiting the enforceable lifetime of patents is unsupported by any authority or precedent, and has been previously advanced by him and rejected by both this Court and the Federal Circuit in earlier litigation by him. Kearns disregards the fact that any "loss" of his patent enforcement rights was caused by his own improper conduct and not by any denial of a Constitutional right. His contentions that the courts below erred in the second dismissal of his claims on grounds of *res judicata*, and in not extending the enforceable life of his patents, represent no more than the stubborn persistence of a *pro se* plaintiff who has unsuccessfully advanced the same baseless arguments before, yet seeks to advance them here once again.

The absence of any sound basis for Kearns' Petition is evident from the full past history of the litigation between Kearns and GM.

Kearns brought suit against GM in the district court of Michigan in 1985, charging infringement of five patents. After eight years of pendency, a time attributable largely to Kearns' own conduct and litigation strategy, Kearns refused to obey the re-

peated orders of the Michigan district court to identify and apply the claims of his patents to any GM products charged by him to infringe. Accordingly, the Michigan district court dismissed the action on July 21, 1993 in accordance with Rules 41(b) and 16(f), Fed. R. Civ. P. The Federal Circuit affirmed and this Court denied certiorari.

Meanwhile, on the day after the Michigan court's dismissal, and prior to his appeal, Kearns brought this second, retaliatory suit against GM before the district court in Virginia, charging infringement *inter alia* of the same five patents dismissed in Michigan, and further charging infringement of sixteen other patents not previously pleaded in Michigan. The Virginia district court thereafter dismissed Kearns' complaint as to all patents in suit on August 29, 1993 on the grounds of *res judicata*: the five patents in suit in Michigan and the sixteen others which could and should have been earlier raised and pleaded therein.

Kearns subsequently appealed. On August 28, 1996, the Federal Circuit affirmed the *res judicata* dismissal of the five patents from the Michigan action, but reversed and remanded as to the sixteen others on the basis that each such patent represents a separate and distinct cause of action not previously adjudicated.

Kearns now petitions here to overcome the Federal Circuit's affirmance of the Virginia district court's dismissal for *res judicata* of the five patents originally in suit in Michigan. He bases his petition on a rambling and extraneously irrelevant contention that his patents, dismissed solely on the grounds of *res judicata*, are somehow entitled to some exemption from dismissal because they expired while his litigation was pending, and that he is "Constitutionally" entitled to a judicially-extended term beyond that limited by statute.

SUMMARY OF THE ARGUMENT

Kearns has failed to identify, either specifically or by reasonable inference, any question which would justify a grant of his Petition and a review of the decisions below. No conflicting appeals court rulings have been identified. No departure from accepted and usual proceedings have been shown to have taken place. No unsettled federal law has been identified.

In his Petition, Kearns' questions presented do not dispute the correctness of the Federal Circuit's decision affirming the trial court's dismissal of his patent infringement action on grounds of *res judicata*. Instead, Kearns makes the improper and irrelevant argument that the enforceable lifetime of his patents should be judicially extended.

Kearns' Petition should be denied by this Court as failing to raise any question which would justify grant of the Petition and review of the lower court decisions.

REASONS FOR DENYING THE PETITION

I. KEARNS HAS FAILED TO IDENTIFY A QUESTION SUBJECT TO REVIEW UNDER SUPREME COURT RULE 10.

None of Kearns' questions presented, nor his Petition in general, meet the standards of Sup. Ct. R. 10. The Federal Circuit affirmed the district court's dismissal of five of Kearns' patent infringement claims on the basis of *res judicata*. In seeking review, Kearns has cited no appeals court decision which conflicts with the Federal Circuit's affirmance, nor has Kearns demonstrated that the Federal Circuit's affirmance "so far departed from the accepted and usual course of judicial proceedings" as to require this Court's supervision. The Federal Circuit reviewed in detail, and specifically identified, the record evidence supporting the district court's holding to ensure that the district court committed no error of law.

In affirming that portion of the district court's decision, the Federal Circuit did not decide any question of federal law which is either unsettled or conflicts with applicable decisions of this Court. The Federal Circuit and the district court acted in full accord with established principles concerning the application of the doctrine of *res judicata*, which bars a claim where a final judgment on the merits has previously been entered in a case involving the same claim. *Nevada* v. *United States*, 463 U.S. 108, 130 (1983). Because a dismisal under Fed. R. Civ. P. 41(b) for failure to prosecute operates as an adjudication on the merits [*e.g. Edwards* v. *City of Houston*, 78 F.3d 983, 994 (5th Cir. 1996; *LeBeau* v. *Taco Bell, Inc.*, 892 F.2d 605, 670 (7th Cir. 1989)], the Virginia district court properly invoked *res judicata* to dismiss Kearns' five claims at issue in the prior Michigan district court action. *Napier* v. *Thirty or More Unidentified Federal Agents*, 855 F.2d 1080, 1087 (3d Cir. 1988); *Kimmel* v. *Texas Commerce Bank*, 817 F.2d 39, 40-41 (7th Cir. 1987).

II. Both This Court and The Court of Appeals for the Federal Curcuit Have Expressly Declared That All Remedies Under a Patent Grant Terminate At the End of the Seventeen Year Period.

The Constitution authorizes Congress to secure *for limited times* to inventors the exclusive right to their discoveries. Art. I, § 8, cl. 8. Congress exercises that authorization through the Patent Statute, which grants the patent owner the right to exclude others from making, using or selling the patented invention in the United States for a limited period. The applicable statutory period for the patents here in suit is seventeen years from the date of issuance. 35 U.S.C. § 154 (1988). These rights become public property upon termination of the patent's statutory term, and any further projection of the patent

monopoly after expiration is not enforceable. *Brulotte, et al.* v. *Thys Co.*, 379 U.S. 29, 30, 32 (1964). In fact, "any attempted reservation or continuation in the patentee or those claiming under him of the patent monopoly, after the patent expires, whatever the legal device employed, runs counter to the policy and purpose of the patent laws." *Scott Paper Co.* v. *Marcalus Co.*, 326 U.S. 249, 256 (1945).

The questions which Kearns seeks to have reviewed by this Court are well settled in law and present no conflict either between appeals courts or with the law as set forth by this Court. Post-expiration injunctive relief is simply unavailable under the Patent Laws. Congress has the power to provide term extension in appropriate circumstances, *see* 35 U.S.C. §§ 155, 156 (1988), and it has chosen not to provide for post-expiration injunctive relief under the circumstances where a patent routinely expires during litigation. *See Denkler* v. *United States*, 782 F.2d 1003, 1008 (Fed. Cir. 1986) ("Should Congress wish to extend the [statute's scope], it knows how to do so.").

In light of the unequivocal state of the law, Kearns' request that the Court judicially establish an exception to the limitations established by Congress on the enforceability of patents would have to be denied even if *res judicata* did not serve to bar these claims as it does. The law is well settled that he can obtain neither injunctive relief under 35 U.S.C. § 283 (1988) after the statutory expiration of his patents, nor monetary damages under 35 U.S.C. §§ 284, 286 (1988) for those patents which expired more than six years before the commencement of his action.

III. The Delay in Adjudicating Kearns' Claims Was the Result of His Own Conduct.

Contrary to the implication of Kearns' argument that an exception to statutory enforceability is required because the delay in the adjudication of his patent claims occurred through no fault of his own, the record is replete with evidence to demonstrate conclusively that Kearns both delayed the filing of this second suit in Virginia until after the dismissal (affirmed by the Federal Circuit) of his first suit in Michigan, engaged in dilatory and improper tactics for which he was solely responsible in the Michigan action and, to the extent his filing of this case was delayed by his pursuit of other litigation against all other members of the world's automobile manufacturing industry, engaged in dilatory and improper litigation tactics that prolonged that other litigation. Thus, any delay that resulted in postponement of the commencement of this action was caused by Kearns. Accordingly, Kearns has no standing to argue that the Court should create an exception to the time limits on the enforceability of his patents.

In the first suit against GM in the district court in Michigan, *Kearns* v. *General Motors Corporation*, Civil No. 85-70461 (E.D. Mich. July 21, 1993), *aff'd*, 31 F.3d 1178 (Fed. Cir. 1994), *cert. denied*, 115 S.Ct. 1105 (1995), Kearns' employment of dilatory and improper tactics for which he was solely responsible caused the action to be pending for eight years. At that point, the court dismissed the action because of Kearns' willful failure to comply with repeated pretrial orders and other defiant conduct on his part.

Similarly, Kearns' cases against other automobile manufacturers were prolonged and delayed by Kearns' own misconduct and dilatory behavior. This behavior was documented by the Federal Circuit in its per curiam opinion in *Kearns* v. *Wood Motors, Inc., et al.*, No. 96-1314 (Fed. Cir. January 17, 1997). As the Federal Circuit's opinion describes, that case began in

1978 and concluded 19 years later when the Federal Circuit upheld the trial court's order requiring Kearns to pay $123,791 in sanctions because of his dishonest and improper conduct. The Federal Circuit noted that Kearns, like all litigants, "must follow the prescribed time limits and procedures, and that once an issue has been finally determined, a litigant cannot relitigate it . . ." (*Id.* at 8), and summarized the history of the case by noting that "Kearns' problems have been largely of his own making." (*Id.* at 10).

This record indisputably demonstrates Kearns' sole responsibility for the expiration of his rights to enforce the patent claims made by him in this action. As such, his extraordinary request to the Court to create an exception to the clear statutory limitations on the enforceability of patents that Congress expressly created is meritless.

IV. Kearns Has Previously Raised the Issue of Extending the Term of His Patents in This Court and in the Federal Court.

The arguments Kearns makes with respect to extending the term of the monopolies granted to him under his patents are arguments that Kearns has made and lost previously before both this Court and the Federal Circuit. In his unsuccessful Petition for a Writ of Certiorari in *Kearns* v. *General Motors Corporation*, Civil No. 85-70461 (E.D. Mich. July 21, 1993), *aff'd*, 31 F.3d 1178 (Fed. Cir. 1994), *cert. denied*, 115 S.Ct. 1105 (1995), and in his appeal below of that case to the Federal Circuit, Kearns made the same bizarre argument in an unsuccessful effort to create a judicial exception to the limited enforceable lifetime of patents clearly prescribed by Congress. Similarly, he unsuccessfully made the same argument to the Federal Circuit in this case. In short, Kearns' argument has been repeatedly rejected, and he should be precluded from making the same failed argument here yet again.

CONCLUSION

Kearns' Petition for Writ of Certiorari fails to identify any questions which would justify grant of the Petition and review of the lower court decisions. Accordingly, Kearns' Petition for Writ of Certiorari should be denied.

Respectfully submitted,

D. DENNIS ALLEGRETTI
BURNS & LEVINSON
125 Summer Street
Boston, Massachusetts 02110
(617) 345-3000

Attorney for Respondents, General Motors Corporation and Brown's Buick & Isuzu

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APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

NOTICE OF ENTRY OF
JUDGMENT ACCOMPANIED BY OPINION

OPINION FILED AND JUDGMENT ENTERED: 02/28/86

The attached opinion announcing the judgment of the court in your case was filed and judgment was entered on the date indicated above. The mandate will be issued in due course.

Information is also provided about petitions for rehearing and suggestions for rehearing in banc. The questions and answers are those frequently asked and answered by the Clerk's Office.

Costs are taxed against the Appellee[s] in favor of the Appellant[s] under Rule 39. The party entitled to costs is provided a bill of costs form and an instruction sheet with this notice.

The parties are encouraged to stipulate to the costs. A bill of costs will be presumed correct in the absence of a timely filed objection.

Costs are payable to the party awarded costs. If costs are awarded to the government, they should be paid to the Treasurer of the United States. Where costs are awarded against the government, payment should be made to the person[s] designated under the governing statutes, the court's orders, and the parties' written settlement agreements. In cases between private parties, payment should be made to counsel for the party awarded costs or, if the party is not represented by counsel, to the party pro se. Payment of costs should not be sent to the court. Costs should be paid promptly.

If the court also imposed monetary sanctions, they are payable to the opposing party unless the court's opinion provides otherwise. Sanctions should be paid in the same was as costs.

Exhibits and visual aids shall be promptly retrieved by the party that lodged them with this court.

/s/_____
FRANCIS X. GINDHART
Clerk

cc: ROBERT W. KEARNS
D. DENNIS ALLEGRETTI

KEARNS V. GENERAL MOTORS, 94-1057
DCT-93-CV-966

APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ORDER

Before NEWMAN, Circuit Judge, PLAGER, Circuit Judge.

A petition for rehearing having been filed by the APPELLANT.

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED.

The mandate of the court will issue on October 2, 1996.

FOR THE COURT,
FRANCIS X. GINDHARD, CLERK

/s/_____
Brian P. LeDuc
Associate Chief Deputy Clerk

September 26, 1996

cc: ROBERT W. KEARNS
D. DENNIS ALLEGRETTI

KEARNS V. GENERAL MOTORS, 94-1057
(DCT - 93-CV-966)

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

APPENDIX C.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

94-1057

ROBERT W. KEARNS,
PLAINTIFF-APPELLANT,

v.

GENERAL MOTORS CORPORATION
AND BROWN'S BUICK & ISUZU,
DEFENDANTS-APPELLEES.

DECIDED: August 28, 1996

Before NEWMAN, Circuit Judge, NIES, Senior Circuit Judge,* and PLAGER, Circuit Judge.
NEWMAN, Circuit Judge.

Robert W. Kearns appeals the dismissal, by the United States District Court for the Eastern District of Virginia, of his suit for patent infringement against the General Motors Corporation and Brown's Buick & Isuzu.[1] The district court held that the action was res judicata based on the involuntary

---

* Senior Judge Helen Wilson Nies died on August 7, 1996. The case was decided by the remaining judges in accordance with Fed. Cir. Rule 47.11.

[1] *Kearns* v. *General Motors Corp.*, C.A. No. 93-966-A (E.D. Va. Aug. 29, 1993), *reconsid'n denied*, Sept. 28, 1993, Oct. 26, 1993.

dismissal of an infringement action brought by Dr. Kearns against General Motors in the United States District Court for the Eastern District of Michigan. The Michigan action had been dismissed before trial, for Dr. Kearns' failure to comply with certain deadlines and other orders of the court. There was no adjudication of the merits by the Michigan court; the dismissal was on procedural grounds, and was preceded by the district court's refusal to permit Dr. Kearns, appearing *pro se*, tardily to amend his complaint to add other patents to the five patents that were identified in the complaint.

In the Virginia complaint Dr. Kearns included the five patents that were before the Michigan court plus sixteen additional patents. The Virginia district court held that all twenty-one patents "should have been litigated in the Detroit litigation and they're barred by not having been so." Concerning the devices asserted to be infringing, the Virginia court stated that "even if the controls in the instant case differ from the controls litigated in the Michigan case, the case is still barred by *res judicata*." Neither the Michigan court nor the Virginia court made any substantive determination with respect to any patent or any accused device. The Virginia court did not identify the inventions claimed by any of the patents; the five patents that were also in the Michigan complaint and the sixteen additional patents that were only in the Virginia complaint.

We agree with the Virginia district court that the Michigan decision was *res judicata* in Virginia as to the five patents that were before the Michigan court. That suit could not be reopened in Michirgan, and thus could not be opened in Virginia. However, we conclude that the Michigan decision was not *res judicata* as to the sixteen patents that were presented for the first time in the Virginia complaint.

DISCUSSION

The complaint that was filed in Michigan charged General Motors with infringement of five specified patents. A letter from General Motors to Dr. Kearns dated September 2, 1992, relating to discovery, acknowledged only the five patents in suit. On July 2, 1993 the special master issued an order which stated "Dr. Kearns' letter of June 24, 1993 refers to some 7,424 claim-circuit combinations potentially at issue, involving 23 different patents. There are only five patents in this suit from which to select claims." At a hearing on July 21, 1993 the Michigan court stated that there were only five patents in suit, a statement to which both General Motors and Dr. Kearns agreed.

In its Memorandum accompanying its order of involuntary dismissal, the Michigan court referred to the five patents as the only patents in suit. "Plaintiff alleges ownership of five patents as follows: [five patent numbers listed]." The Memorandum also quotes the special master's order that "There are only five patents in this suit from which to select claims." The district court's order of dismissal did not, either directly or indirectly, include the still-unidentified patents that had not been asserted against General Motors.

The basis of the dismissal in Michigan was Dr. Kearns' inadequate compliance with the court's order and deadlines. Thus the Michigan court rejected Dr. Kearns' attempt to amend his complaint after the court's final deadline. Although Dr. Kearns apparently argued that he needed additional discovery to determine which models infringed which patents, the Michigan court concluded that dismissal under Fed. R. Civ. P. 41(b)[2]

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[2] **Rule 41(b) Involuntary Dismissal: Effect Thereof**

For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies,

was appropriate. That decision was affirmed by this court, and is not subject to collateral attack. *Kearns* v. *General Motors Corp.*, 31 F.3d 1178 (Table), 33 USPQ2d 1696 (Fed. Cir. 1994) (nonprecedential), *cert. denied*, 115 S.Ct. 1105 (1995).

A dismissal pursuant to Rule 41(b) is deemed to be on the merits unless the dismissing court specifies otherwise. However, the Michigan decision disposed of only the five patents that were before that court. Each of the sixteen additional patents in the Virginia complaint is, by law, directed to a separate invention. 35 U.S.C. § 101. Indeed, two independent and distinct inventions cannot be claimed in the same patent. *See* 35 U.S.C. § 121:

> If two or more independent and distinct inventions are claimed in one application, the Commissioner may require the application to be restricted to one of the inventions.

By statutory and common law, each patent establishes an independent and distinct property right. *See Consolidated Fruit-Jar Co.* v. *Wright*, 94 U.S. 92, 95 (1877) ("A patent for an invention is as much property as a patent for land. The right rests on the same foundation, and is surrounded and protected by the same sanctions."); *Carl Schenck, A.G.* v. *Nortron Corp.*, 713 F.2d 782, 786 n.3, 218 USPQ2d 698 (Fed. Cir. 1983) (a patent is a property right).

Each patent asserted raises an independent and distinct cause of action. Just as infringement of one patent is not a ground of liability for infringement of a different patent, so an involuntary dismissal of a suit regarding one patent is not a ground for dismissal of a different suit on a different patent. A possible

---

a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

basis for barring the different suit is that the causes of action should have been litigated together. However, precedent illustrates that, in cases in which *res judicata* was applied solely on the basis that a second cause of action could have been included with the first, the first case was fully litigated on its merits nd the same issues were raised in the second case. *E.g.*, *Mars, Inc.* v. *Nippon Conlux Kabushiki-Kaisha*, 58 F.3d 616, 35 USPQ2d 1311 (Fed. Cir. 1995) (claim preclusion barred separate infringement action against Japanese parent corporation after plaintiff had obtained final judgment against its wholly owned American subsidiary); *Pfaff* v. *Wells Electronics, Inc.*, 5 F.3d 514, 28 USPQ2d 1119 (Fed. Cir. 1993) (intrerpretation of a patent claim in prior infringement litigation has issue preclusive effect in second case between same parties; however, disputed facts concerning different accused devices rendered summary judgment improper); *Del Mar Avionics, Inc.* v. *Quinton Instrument Co.*, 836 F.2d 1320, 1324, 5 USPQ2d 1255, 1258 (Fed. Cir. 1987) ("a point not in litigation in one action cannot be received as conclusively settled in any subsequent action upon a different cause, because it might have been determined in the first action") (quoting *Cromwell* v. *County of Sac*, 94 U.S. (4 Otto) 351, 356 (1876)). When applying *res judicata* to bar causes of action that were not before the court in the prior action, due process of law and the interest of justice require cautious restraint. Restraint is particularly warranted when the prior action was dismissed on procedural grounds.

Neither the Michigan nor the Virginia Court discussed the substance of any of the patents before it. However, the Virginia court summarily barred Dr. Kearns from enforcing any of these twenty-one patents. This action rendered unenforceable and useless sixteen patents that had never been before any court. Such a destruction of property rights demands adequate procedural and substantive bases. Rule 41(b) does not reasonably

impose *res judicata* upon causes of action that were not pled in the dismissed action. *See Montana* v. *United States*, 440 U.S. 147, 153 (1979) (*res judicata* requires that there have been "a full and fair opportunity to litigate" the precluded subject matter).

The Michigan court, dismissing Kearns' complaint on procedural grounds, did not, because it could not, reach out to extinguish substantive patent rights that were not before it. In *Lawlor* v. *National Screen Serv. Corp.*, 349 U.S. 3232, 327 (1955) the Court, discussing *res judicata* in connection with a procedural dismissal with prejudice, observed that "the judgment was unaccompanied by findings and hence did not bind the parties on any issue . . . which might arise in connection with another cause of action." *Res judicata* does not automatically apply to claims that might have been included in the prior complaint; it must be shown that they necessarily were included in the judgment, and tht the interest of justice is not disserved by applying *res judicata* to claims that were never presented for adjudication. *See Brown* v. *Felsen*, 442 U.S. 127, 132 (1979) ("Because *res judicata* may govern grounds and defenses not previously litigated, however, it blockades unexplored paths that may lead to truth. For the sake of repose, *res judicata* shields the fraud and the cheat as well as the honest person. It is therefore invoked only after careful inquiry.").

Issue preclusion, of narrower scope than *res judicata*, requires that the identical issue was decided on the merits between the same parties. 1B James W. Moore et al., *Moore's Federal Practice*, ¶¶ 0.401, 0.405, 0.441 (2d ed. 1992). In the case at bar, it is not possible to show that the identical issue was presented in the sixteen patents that were not before the Michigan court, as in the five patents that were; for each patent, by law, covers an independent and distinct invention. Further, infringement must be separately proved as to each patent. *See*

generally, Young Engineers, Inc. v. *United States Int'l Trade Comm'n*, 721 F.2d 1305, 1316, 219 USPQ 1142, 1152 (Fed. Cir. 1983), wherein this court stated, albeit in dictum, that "With respect to patent litigation, we are unpersuaded that an 'infringement claim,' for purposes of claim preclusion, embraces more than the specific devices before the court in the first suit." *See also, e.g., Angel* v. *Bullington*, 330 U.S. 183, 202-03 (1947) ("It is not every case in which a litigant has had 'one bit at the cherry' that the law forbids another. In other words, it is not every such case in which the policy of stopping litigation out weighs that of showing the truth.") *See generally* 18 C. Wright, A. Miller and E. Cooper, *Federal Practice and Procedure*, §§ 4419, 4442, 4443 (1981) (discussing the appropriateness of a flexible view); *Restatement (Second) of Judgments* § 27 comment e (1982) ("In the case of a judgment entered by confession, consent, or default, none of the issues is actually litigated" and issue preclusion does not apply).

We conclude that the dismissal of the Michigan suit under Rule 41(b) did not impose the bar of *res judicata* upon patents that had not been included in the Michigan suit, were not before the Michigan court, and were not part of the Michigan judgment. Precedent cautions that *res judicata* is not readily extended to claims that were not before the court, and precedent weighs heavily against denying litigants a day in court unless there is a clear and persuasive basis for that denial.

We conclude that the Michigan dismissal was *res judicata* only with respect to the five patents that were before the Michigan court. The dismissal is affirmed as to these five patents. The dismissal is vacated as to the sixteen patents that were not before the Michigan court. The case is remanded for appropriate further proceedings.

Costs to Dr. Kearns.

AFFIRMED IN PART, VACATED IN PART, and REMANDED

APPENDIX D.

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

ROBERT W. KEARNS,
Plaintiff,

v. Civil Action No. 93-966-A

GENERAL MOTORS CORP., ET AL.,
Defendants.

ORDER

This matter comes before the Court on defendant's motion to dismiss.

For the reasons stated from the bench, the motion is hereby GRANTED.

The Clerk is directed to send copies of this Order to all counsel of record.

/s/_____
T. S. Ellis, III
United States District Judge

Alexandria, Virginia
August 27, 1993

APPENDIX E.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

ROBERT W. KEARNS,
Plaintiff,

v. Civil Action No. 93-966-A

GENERAL MOTORS CORP., AND
BROWN'S BUICK & ISUZU,
Defendants.

ORDER

This matter comes before the Court on plaintiff's motion for reconsideration.

The Court holds that:

1. The disputed controls in the instant case do not appear to be substantially different from the controls litigated in the previous Michigan case.

2. Even if the controls in the instant case differ from the controls litigated in the Michigan case, the case is still barred by *res judicata*. *See Sanders Confectionery Products* v. *Heller Financial*, 973 F.2d 474 (6th Cir. 1992).

3. The fact that the Michigan suit was dismissed without a trial does not prevent a finding of *res judicata*. *See Young Engineers* v. *U.S. Int'l Trade Comm'n*, 721 F.2d 1305, 1314 (Fed. Cir. 1983).

For these reasons, plaintiff's motion for reconsideration is DENIED.

The Clerk is directed to send copies of this Order to all counsel of record.

/s/_____
T. S. Ellis, III
United States District Judge

Alexandria, Virginia
September 28, 1993

APPENDIX F.

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

ROBERT W. KEARNS,
Plaintiff,

v. Civil Action No. 93-966-A

GENERAL MOTORS CORPORATION AND
BROWN'S BUICK & ISUZU,
Defendants.

ORDER

This matter comes before the Court on plaintiff's motion for reconsideration of this Court's denial of plaintiff's prior motion for reconsideration and on plaintiff's motion to file additional documents under seal.

In an order dated September 26, 1993, this Court denied plaintiff's motion for reconsideration. Plaintiff's motion for reconsideration of this order is DENIED.

The Court ORDERS the additional documents submitted by plaintiff to be filed by the Clerk of this Court.

The Clerk is directed to send copies of this Order to all counsel of record.

/s/_____
T. S. Ellis, III
United States District Judge

Alexandria, Virginia
October 26, 1993

(3)

Supreme Court, U.S.
FILED
MAR 27 1997
CLERK

No. 96-1312

In The

Supreme Court of the United States

October Term, 1996

ROBERT W. KEARNS,

Petitioner,

v.

GENERAL MOTORS CORPORATION AND BROWN'S BUICK AND ISUZU,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

REPLY TO BRIEF IN OPPOSITION

ROBERT W. KEARNS, PH.D.
Manufacturing-Inventor
301 Houghton Laboratory Lane
Queenstown, Maryland 21658
(410) 827-9337

10 pp

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QUESTIONS PRESENTED FOR REVIEW

When does the inventor's consideration —— the "for limited times" of Const. Art. I §8 cl 8 —— start?

When, intermediate into the "for limited times", infringement occurs and is later adjudged—— what happens to the inventor's consideration?

Is the Court of Appeals for the Federal Circuit's opinion supporting denial of five of Kearns' patents to him in an up-coming infringement trial with General Motors Constitutional, **and**, in accord with Part III, § 1, Article 41 ¶¶ 3 & 4 of the Uruguay Round Trade Agreements?

Are the Part III, § 532, (a)(1) [§ 154] patent provisions of the GATT Treaty Constitutional and in accord with 35 USC § 102(b) and the application-to-patent-issue-delay time?

Is the Commissioner of Patent's grant "for the term of seventeen years from the date of this grant" Constitutional?

Are 35 U.S. Code § 281 civil actions with § 284 Damages phases but without § 283 Injunction phases lawful and Constitutional?

Do the Kearns v. Ford and Kearns v. Chrysler & AMC 35 U.S. Code § 281 civil actions require § 283 phase proceedings to be lawful and Constitutional?

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DR. KEARNS' REPLY TO GM'S BRIEF IN OPPOSITION

There is a conflict between
Dr. Kearns' new Constitutional truth
derived rigorously from Art. I § 8 cl 8
and,
both 35 U.S.C. § 154 (1988) and the GATT Treaty.

"This Constitution ... and all treaties made, shall be the supreme law of the land." Const. Art. 6 ¶ 2. Dr. Kearns did not stray from the ratified words of Const. Art. I § 8 cl 8 in his derivation of the new[1] "Constitutional truths" he derived from Const. Art. I § 8 cl 8 at (12) and (18) on page 5 of Dr. Kearns' Petition. Dr. Kearns' new "Constitutional truths" are supported by Professor Mergler , whose academic specialization is *Mathematical Logic*, who also, in his *Amicus Curiae Brief,* endorsed Dr. Kearns analysis. In GM's Brief in Opposition, it did not cite any errors in Dr. Kearns' derivation of the answers to Dr. Kearns' question presented for review:

> "When does the inventor's consideration —— the "for limited times" of Const. Art. I §8 cl 8 —— start?

All Dr. Kearns' U.S. patents are assembled with their issue dates on page 11 of his Petition. None were issued after October 1, 1985. Since Const. Art. I § 9 ¶ 3 is:

> "No ... ex post facto law shall be passed."

---

[1] Said new Constitutional truths: that the "for limited times (plural)" start with 'the first moment of "exclusive right" of clause 8'; and, that the "for limited times"-life-clock stops when infringement occurs intermediate into the inventor's "for limited times" until the inventor's "exclusive right" is re-established through the 35 U.S.C. § 281 'remedy' civil action which means that the "for limited times" can resume and stop, resume and stop, ... giving meaning to the plural "for limited times" in Const. Art. I § 8 cl 8; said derived by Dr. Kearns at (12) and (18) on page 5 of Dr. Kearns' Petition from a complete Const. Art. I § 8 cl 8

There is danger that GM's citation at page 5, beginning the fifth line from the end of page 5:

> "The applicable statutory period for the patents here in suit is seventeen years from the date of issuance. 35 U.S.C. § 154 (1988)."

would mislead this Supreme Court as none of Dr. Kearns' U.S. patents are subject to the 1988 Legislation phrase, *supra*. Hence GM's assertion that "The applicable statutory period for the patents here in suit is seventeen years from the date of issuance." doesn't apply here and is not a truthful answer to Dr. Kearns' question presented for review, *supra*. But since the words of the 1988 Congressional Legislation at 35 U.S.C. § 154 (1988) cited by GM, *supra*, are included in the General Agreement on Tariffs and Trade ("GATT") Treaty at p. 465:

> **Subtitle C — Patent Provisions**
>
> SEC. 532. Patent Term and Internal Priority.
>
> (a) Patent Rights.—
>
> (1) Contents and Term of Patent.— Section 154 of title 35, United States Code, is amended to read as follows:"**§ 154. Contents and term of patent**
>
> "(a) In General.—
>
> "(1) Contents.— ... .
>
> "(2) Term.— Subject to the payment of fees under this title, such grant shall be **for a term beginning on the date on which the patent issues** and ending 20 years from the date on which the application for the patent was filed in the United States or, if the application contains a specific reference to an earlier filed application or applications under section 120, 121, or 365(c) of this title, from the date on which the earliest such application was filed. (**Emphasis** added.)
>
> "(3) Priority.— ... ."

GM has identified for the Court a conflict, under Supreme Court Rule 10, between said new "Constitutional truths" derived from Const. Art. I § 8 cl 8 and the words: of Congress' Legislation 35 U.S.C. § 154 (1988); and, of the GATT Treaty!

There cannot be two different
supreme laws of the land
on the same subject.

In short, there cannot be two supreme laws of the land! The 35 U.S.C. **§ 40. Same; contents and duration** of Congress' legislation of R.S. § 4884; May 23, 1930, c. 312, § 1, 46 Stat. 376 is silent on when the "for limited times" starts; the 35 U.S.C. **§ 154. Contents and term of patent** of Congress' legislation of July 19, 1952, c. 950, § 1, 66 Stat. 804. is also silent on when the "for limited times" starts; the 35 U.S.C. **§ 154. Contents and term of patent** of the 1965 amendment Pub. L. 89-83 added "subject to the payment of issue fees as provided in this title." and remained silent on when the "for limited times" starts; the 35 U.S.C. **§ 154. Contents and term of patent** of the 1980 amendment Pub. L. 96-517 substituted "payment of fees" for "payment of issue fees" and remained silent on when the "for limited times" starts; and since Dr. Kearns' '066 patent was filed on Jan. 30, 1967, 18 years, 5 months and 23 days before it issued on July 23, 1978 Dr. Kearns would have received but 1 year, 6 months and 7 days of "for limited times" under the 35 U.S.C. § 154 (1988) as his consideration of the '066 invention which the examiner characterized as "too good."

All Dr. Kearns' U.S. patents were issued under the 35 U.S.C. **§ 154. Contents and term of patent** of 1965/80 which was silent on when the "for limited times" starts. Dr. Kearns' U.S. patents have been infringed before the day, on the day, and after the day of their issuance as proven by the record in

Kearns v. *Ford Motor Company* and *Kearns* v. *Chrysler Corp. and American Motors Corp.*

As Dr. Kearns has experienced, when new knowledge has been derived correctly, it becomes easy to go back and check those derived new knowledge results. Here, isn't it obvious that a 'term' of time cannot meet the multiple "resume and stop" requirements of a successful (large number of infringements) invention? And isn't it obvious, that under 35 U.S. Code § 102 that the inventor's patent may be infirnged upon the day of issuance? And isn't it obvious, that the "for limited times" can only first start "with the first moment of exclusive right?" And that that 'first moment of exclusive right' might follow a 35 U.S.C. § 281 'remedy' civil action — as is true here in Petition for Writ of Certiorari No. 96-1312?

Under Const. Art. 6 ¶ 2,
both 35 U.S.C. § 154 (1988) and
the GATT Treaty are unConstitutional.

As shown above, under Const. Art. 6 ¶ 2, the 35 U.S.C. § 154 (1988) and the GATT Treaty are unConstitutional" (as/if) Dr. Kearns and Dr. Mergler are correct.

Respondents improper assertions.

Dr. Kearns doesn't ask that the Supreme Court "extend the life of his patents" as asserted by GM at p. 2, line 10 of their Brief in Opposition — he simply asks for a 'first moment of "exclusive right" under his patents in accord with the U.S. Constitution's proffered consideration to inventor's like himself at Const. Art. I § 8 cl 8.

Nor does Dr. Kearns "ignore the proper application by the Federal Circuit of the principle of *res judicata* as asserted by GM at p. 2 line 12 of their Brief in Opposition — Kearns simply has read the GATT Treaty and knows that the Fed. R. Civ. P. Rule 41(b) in which when a District Judge "does not

otherwise specify" a case which has not resulted in a hearing on the merits is treated "as if" a hearing on the merits occurred does not satisfy the GATT Treaty requirements at Part III, §1, Art. 46, ¶¶ 3 & 4. Under Const. Art. 6 ¶ 2, the GATT Treaty shall shall also be "the supreme law of the land." Fed. R. Civ. P. Rule 41(b) is unConstitutional under the GATT Treaty.

That a 'term' of single period time satisfies the "for limited times" (plural) of Const. Art. I § 8 cl 8 is an unsettled federal law problem. The Federal law of 35 U.S.C. § 40 [1930] did not specify when the (unConstitutional) term of seventeen years starts; that 35 U.S.C. § 154 [1952/65/80] did not specify when the (unConstitutional) term of seventeen years starts either; is other unsettled federal law identified by Kearns to be addressed by this Supreme Court which counters GM's allegation at page 4, line 7.

Congress need but legislate
a quantity of "for limited times"
to promote science and the useful arts.

When Dr. Kearns focuses on Const. Art. I § 8 cl 8 being complete except for Congress identifying the quantity of "for limited times" and finally derives new "Contitutional truths" therefrom, the Judicial practices, made without Constitutional authority justify this Supreme Court determining the standard of compensation for inventors through Dr. Kearns. Would the Supreme Court Justices work in behalf of the public without their compensation standard being established? Why would the Justices expect inventors to be different then themselves? The Constitutional command is to promote science and the useful arts. Is allowing every automobile assembler to infringe Dr. Kearns' 23 U.S. patents in the art of Intermittent Windshield Wiper Systems, and to subject him, improperly, to "lawyer problems" for the thirty-four years since Dr. Kearns brought

his family car equipped with IWWS to Ford, Chrysler, and GM in Sept. '63 - '65 without a proper standard of compensation to enforce on his U.S. patents is a tragedy for the U.S. public. Their jobs depend upon what inventors like Kearns do. Are the Justices entitled to use Dr. Kearns IWWS inventions that they and their family members have on each Justices' cars? Your cars can be of any assemblage — Dr. Kearns has licensed no one. Isn't your Justices "use" a violation of *Roche Products* v. *Bolar Pharmaceutical Co.*, 733 F.2d 858, 862; 221 U.S.P.Q. 937 (Fed. Cir. 1984)? Think about it.

To promote science and the useful arts

To promote science and the useful arts, hear this Petition.

CONSTITUTIONAL PROVISIONS INVOLVED

Art. I, Section 8, Clause 8

"The Congress shall have the Power:

To promote the Progress of Science and Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

Art. I, Section 9, Paragraph 3

"No bill of attainer or ex post facto law shall be passed."

Art. 6, Paragraph 2

"This Constitution and the laws of the United States which shall be made in pursuance thereof and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

STATUTES INVOLVED

35 U.S. Codes

§ 40. Same; contents and duration

Every patent shall contain a short title or description of the invention or discovery, correctly indicating its nature and design, and a grant to the patentee, his heirs or assigns, for the term of seventeen years, of the exclusive right to make, use, and vend the invention or discovery (including in the case of a plant patent the exclusive right to asexually reproduce the plant) throughout the United States and Territories thereof, referring to the specification for the particulars thereof. A copy of the specification and drawings shall be annexed to the patent and be a part thereof. R.S. § 4884; May 23, 1930, c. 312, § 1, 46 Stat. 376.

Derivation. Act July 8, 1870, c. 230, § 22, 16 Stat. 201.

§ 154. Contents and term of patent

Every patent shall contain a short title of the invention and a grant to the patentee, his heirs or assigns, for the term of seventeen years, of the right to exclude others from making, using, or selling the invention throughout the United States, referring to the specification for the particulars thereof. A copy of the specification and drawings shall be annexed to the patent and be a part thereof. July 19, 1952, c. 950, § 1, 66 Stat. 804.

§ 154. Contents and term of patent

Every patent shall contain a short title of the invention and a grant to the patentee, his heirs or assigns, for the term of seventeen years, subject to the payment of fees as provided for in this title, of the right to exclude others from making, using, or selling the invention throughtout the United States, referring to the specification for the particulars thereof. A copy of the specification and drawings shall be annexed to the patent and be a part thereof.

As amended July 24, 1965, Pub.L. 89-83, § 5, 79 Stat. 261; Dec. 12, 1980, Pub.L. 96-517, § 4, 94 Stat. 3018.

1980 Amendment. Pub.L. 96-517 substituted "payment of fees" for "payment of issue fees."

1965 Amendment. Pub.L. 89-83 added "subject to the payment of issue fees as provided for in this title."

§ 154. Contents and term of patent

(a) In general.—

(1) Contents.—Every patent shall contain a short title of the invention and a grant to the patentee, his heirs or assigns, of the right to exclude others from making, using, offering for sale, or selling the invention through-

out the United States, or importing into the United States, products made by that process, referring to the specification for the particulars thereof.

(2) Term.—Subject to the payment of fees under this title, such grant shall be for a term beginning on the date on which the patent issues and ending 20 years from the date on which the application for the patent was filed in the United States or, if the application contains a specific reference to an earlier filed application or applications under section 120, 121, or 365(c) of this title, from the date on which the earliest such application was filed.

(3) Priority.—Priority under section 119, 365(a), or 365(b) of this title shall not be taken into account in determining the term of a patent.

(4) Specification and drawing.—A copy of the specification and drawing shall be annexed to the patent and be a part of such patent.

(b) Term extension.—

(1) Interference delay or secrecy orders.—If the issue of an original patent is delayed due to a proceeding under section 135(a) of this title, or because the application for patent is placed under an order pursuant to section 181 of this title, the term of the patent shall be extended for the period of delay, but in no case more than 5 years.

(2) Extension for appellate review.—If the issue of an original patent is delayed due to appellate review by the Board of Patent Appeals and Interferences or by a Federal court and the patent is issued pursuant to a decision in the review reversing an adverse determination of patentability, the term of the patent shall be extended for a period of time but in no case more than 5 years. A

patent shall not be eligible for extension under this paragraph if it is subject to a terminal disclaimer due to the issue of another patent claiming subject matter that is not patentably distinct from that under appellate review.

(3) Limitations.—The period of extension referred to in paragraph (2)—

(A) shall include any period beginning on the date on which the appeal is filed under section 134 or 141 of this title, or on which an action is commenced under section 145 of this title, and ending on the date of a final decision in favor of the applicant;

(B) shall be reduced by any time attributable to appellate review before the expiration of 3 years from the filing date of the application for patent; and

(C) shall be reduced for the period of time during which the applicant for patent did not act with due diligence, as determined by the Commissioner.

(4) Length of extension.—The total duration of all extensions of a patent under this subsection shall not exceed 5 years.

(c) Continuation.—

(1) Determination.—The term of a patent that is in force on or that results from an application filed before the date that is 6 months after the date of the enactment of the Uruguay Round Agreements Act shall be the greater of the 20-year term as provided in subsection (a), or 17 years from grant, subject to any terminal disclaimers.

(2) Remedies.—The remedies of sections 283, 284, and 285 of this title shall not apply to Acts which—

(A) were commenced or for which substantial in-

vestment was made before the date that is 6 months after the date of the enactment of the Uruguay Round Agreements Act; and

(B) became infringing by reason of paragraph (1).

(3) **Remuneration.**—The acts referred to in paragraph (2) may be continued only upon the payment of an equitable remuneration to the patentee that is determined in an action brought under chapter 28 and chapter 29 (other than those provisions excluded by paragraph (2) of this title.

(As amended Aug. 23, 1988, Pub.L. 100-418, Title IX, § 9002, 102 Stat. 1563; Dec. 8, 1964, Pub.L. 103-465, Title V, § 532(a)(1), 108 Stat. 4983.)

§ 281. Remedy for infringement of patent

A patentee shall have remedy by civil action for infringement of his patent. July 19, 1952, c. 950, § 1, 66 Stat. 812.

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Rule 41. Dismissal of Actions

(a) Voluntary Dismissal: Effect Thereof.

... .

(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.